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No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1986

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984

THE UNION OF INDIA,
Respondent and Cross-Petitioner,

vs.

UNION CARBIDE CORPORATION,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The doctrine of *forum non conveniens* authorizes a court to dismiss an action from a U.S. federal court, even when there is proper jurisdiction, in order to serve the ends of justice. Courts often dismiss such cases only if the defendant consents to certain conditions to insure an adequate alternative forum in which to proceed with the litigation. In the present case, the District Court conditioned the forum dismissal upon the defendant's consent, *inter alia,* to provide discovery under the model of the Federal Rules of Civil Procedure and to satisfy any judgment rendered in accordance with minimal requirements of due process. On appeal, the Court of Appeals extended the discovery condition to the plaintiff and *sua sponte* deleted the condition regarding enforcement of a judgment. The issues are:

1. Does a court have authority to impose a condition on a plaintiff whose action is dismissed on the basis of *forum non conveniens?*

2. Is a defendant who prevails on a motion for dismissal on the basis of *forum non conveniens* an aggrieved party with standing to appeal the conditions of dismissal?

3. May an appellate court delete, *sua sponte,* a condition agreed to by the defendant based upon the appellate court's speculation that the District Court was unaware of applicable law?

LIST OF PARTIES

In the wake of the Bhopal disaster, some 145 actions were filed in federal courts in the United States. All of these cases were consolidated and assigned to the Southern District of New York by order of the Judicial Panel on Multidistrict Litigation.

The Union of India, respondent and cross-petitioner, filed a complaint against Union Carbide Corporation, respondent,[1] on April 8, 1985 on behalf of all victims of the Bhopal disaster. The Union of India derived its standing on the bases of the Bhopal Gas Leak Disaster (Processing of Claims) Act, an act of Parliament which granted the Union of India the exclusive right to represent all claimants, as well as the common law doctrine of *parens patriae* and retainers executed by virtually all victims of the disaster. On June 28, 1985, individual plaintiffs' attorneys filed a consolidated complaint, which included a class action allegation. The competing claims to representation of the victims by the Union of India and the individual plaintiffs' attorneys were never presented for resolution to the courts below.

[1]Union Carbide Corporation's Indian subsidiary is Union Carbide India Ltd., of which the parent corporation owns a majority 50.9 percent.

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Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Union of India, respondent and cross-petitioner, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled actions on January 14, 1987. The Union of India's Cross-Petition for a Writ of Certiorari is independent from the writ petition filed by the individual plaintiffs' attorneys, to which the Union of India has filed a Brief in Opposition. The Union of India requests that certiorari be granted only on the questions presented in this cross-petition.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 809 F.2d 195, and is reprinted herein as Appendix A. The opinion of the United States District Court for the Southern District of New York (Keenan, D.J.) is reported at 634 F. Supp. 842, and is reprinted herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 14, 1987. A petition for rehearing filed by the individual plaintiffs' attorneys was denied on February 26, 1987. Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of "the most devastating industrial disaster in history," the deaths of more than 2,000 persons and injuries of hundreds of thousands caused by the escape of lethal methyl isocyanate gas from a pesticide plant in Bhopal, India. 809 F.2d at 197; Appendix A at p. A1. The plant was owned by Union Carbide Corporation ("UCC") and its majority-owned subsidiary, Union Carbide India Ltd. Federal jurisdiction is based upon diversity jurisdiction under Title 28 U.S.C. § 1332.

On July 31, 1985, UCC filed a motion to dismiss all of the federal actions on the basis of *forum non conveniens*. This motion was opposed in the District Court by both the Union of India and the individual plaintiffs' attorneys.

One of the major issues raised by the motion was the adequacy of the Indian forum, the threshold consideration in any *forum non conveniens* analysis. Throughout discovery, briefing and argument, UCC advocated the adequacy and "sophistication" of the Indian legal system. 634 F.Supp. at 852; Appendix B at p. A29. In particular, UCC maintained that the methods of pretrial discovery under the Indian Code of Civil Procedure would be adequate for all parties and

denied any material differences between discovery under the U.S. rules and under the Indian rules, as illustrated by the following response by UCC to a request for admission:

> **Plaintiffs' Request for Admission No. 7:**
>
> That the Indian legal system does not allow pretrial discovery as provided for in the discovery rules of the Federal Rules of Civil Procedure.
>
> **UCC's Response:**
>
> *Denied.* While pretrial discovery provided for in the discovery rules of the Federal Rules of Civil Procedure is not identical to that provided for by the Indian legal system, the Indian legal system does permit pretrial discovery, including written interrogatories, admissions as to documents and facts, inspection and production of documents and other material objects and depositions. See Indian Code of Civil Procedure.

(Emphasis added). UCC also submitted an affidavit to the District Court which stated:

> It is inappropriate and callous on the part of the plaintiffs to assert that the methods of conducting discovery in India make its judicial system inadequate.

Affidavit of J. B. Dadachanji, December 14, 1985.

The plaintiffs, including the Union of India, argued before the District Court that the Indian legal system did not provide an adequate alternative forum. This issue was addressed by the Union of India in response to a request for admission from UCC:

> The Indian Government admits that it is competent to represent claimants in India, but denies that it is capable of doing so on behalf of claims arising from the Bhopal disaster in India because:
>
> (a) Effective jurisdiction over UCC in the courts of India is highly doubtful;

(b) *Upon information and belief, UCC has insufficient assets located in India with which to satisfy any judgment which might ultimately be rendered;*

(c) *Any judgment rendered by an Indian court may not be enforceable against assets of UCC located outside of India;*

(d) *Discovery under the Indian Code of Civil Procedure and under Indian practice is significantly more limited than discovery available under the Federal Rules of Civil Procedure for the United States District Courts;*

(e) The tort law of India is in its nascent development and provides little or no precedent or procedural mechanisms for adjudicating claims arising from the Bhopal disaster; and

(f) Due to procedural constraints and the pending backlog of cases, the adjudication in India of claims arising from the Bhopal disaster would inevitably lead to delay of such magnitude that the prosecution of such claims would effectively be frustrated.

For all these reasons, the Government of India is only capable of representing the Bhopal claimants in the courts of the United States where UCC is unquestionably subject to jurisdiction and where effective, complete and timely relief can be afforded.

(Emphasis added). The Union of India's concern regarding UCC's assets was that the overwhelming majority were located outside of India. Accordingly, any judgment rendered by an Indian court would present UCC with an opportunity to delay judgment day by attempting to relitigate a myriad of issues when that judgment was attempted to be enforced against UCC assets outside of India, thereby effectively denying compensation to the victims of the Bhopal disaster. The Union of India's central concern regarding discovery was that the material qualitative evidentiary facts at the heart of UCC's liability could only be uncovered outside of the territorial boundaries of India pursuant to the Federal Rules of Civil Procedure.

The District Court issued its forum decision on May 12, 1986,

granting UCC's motion for dismissal upon the acceptance by UCC of three conditions, as follows:

1. Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations;
2. Union Carbide shall agree to satisfy any judgment rendered against it by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process;
3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

634 F. Supp. at 867; Appendix B at pp. A55-56.

The District Court based the condition requiring UCC to satisfy any judgment rendered by an Indian court upon its finding that "[t]he possibility of non-enforcement of a foreign judgment... must be addressed at this time." 634 F. Supp. at 852; Appendix B at p. A29. The District Court noted that UCC had argued "perhaps ironically,... for the sophistication of the Indian legal system in seeking dismissal on grounds of *forum non conveniens.*" 634 F.Supp at 852; Appendix B at p. A29. The District Court also noted that both UCC and the Union of India had "indicated a willingness to abide by a judgment of the foreign nation whose forum each seeks to visit." 634 F.Supp. at 852; Appendix B at p. A29. Having found this, the District Court concluded as follows:

> Thus, this Court conditions the grant of a dismissal on *forum non conveniens* grounds on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India. Absent such consent to abide by and to "make good" on a foreign judgment, without challenge except for concerns relating to minimal due process, the motion to dismiss now under consideration will not be granted. The preference of both parties to play ball on a distant field will be taken to its limit, with each party being ordered to be bound by the decision of the respective foreign referees.

634 F.Supp. at 852; Appendix B at p. A29.

With respect to discovery, the District Court premised its condition upon an explicit finding that the Indian discovery rules "would perhaps, however, limit the victims' access to sources of proof." 634 F.Supp. at 850; Appendix B at p. A26.

After the district court's decision, UCC raised for the first time its desire to have discovery in India under the Federal Rules of Civil Procedure. Even then, UCC did not contend that it needed Federal Rules discovery for access to sources of proof. Instead, UCC argued only that it would be "fair" to give it Federal Rules discovery. In an attempt to avoid appellate delays, the Union of India by letter dated May 23, 1986 offered to stipulate to the following discovery procedure:

(i) All discovery conducted with respect to information or individuals customarily located outside India shall be in accordance with the Federal Rules of Civil Procedure;

(ii) The Government of India will not seek discovery pursuant to the Federal Rules of Civil Procedure with respect to individuals or information customarily located inside India without agreeing to submit to similar discovery by Union Carbide Corporation.

UCC declined to accept this stipulation. Instead, on June 12, 1986, UCC consented to the conditions of the District Court dismissal, purporting to "reserve its right to appeal."

On July 10, 1986 UCC filed an appeal and cross appeal before the Court of Appeals for the Second Circuit challenging only one of the conditions to which it had agreed, the condition relating to discovery. Significantly, UCC raised no issue on appeal with respect to the condition obligating it to satisfy an Indian court judgment. The individual plaintiffs' attorneys also appealed, seeking reversal of the decision to dismiss the cases. The Union of India sought affirmance of the District Court opinion in its entirety, satisfied that the conditions of dismissal rendered the courts of India an adequate alternative forum.[2]

[2] The Union of India filed a complaint on behalf of all victims in the District Court of Bhopal on September 5, 1986, and the action has been proceeding in India since that date. However, the discovery phase of the Indian proceeding has not yet commenced.

The Second Circuit issued its decision on January 14, 1987, affirming the District Court's dismissal but deleting, *sua sponte,* the condition requiring UCC to satisfy an Indian court judgment and modifying the discovery condition. The Second Circuit deleted the condition requiring UCC to satisfy any judgment rendered by an Indian court upon its finding that the District Court entered this condition "on the erroneous assumption that, absent such a requirement, the plaintiffs, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary." 809 F.2d at 204; Appendix A at p. A12.[3]

With respect to the discovery condition, the Second Circuit stated:

> [W]e direct that the condition with respect to the discovery of UCC under the Federal Rules of Civil Procedure be deleted without prejudice to the right of the parties to have reciprocal discovery of each other on equal terms under the Federal Rules, subject to such approval as may be required of the Indian court in which the case will be pending. If, for instance, Indian authorities will permit mutual discovery pursuant to the Federal Rules, the district court's order, as modified in accordance with this opinion, should not be construed to bar such procedure. In the absence of such a court-sanctioned agreement, however, the parties will be limited by the applicable discovery rules of the Indian court in which the claims will be pending.

809 F.2d at 205-06; Appendix A at p. A15.

The Second Circuit did not disturb the District Court's finding that plaintiffs' access to sources of proof may be limited in India under Indian discovery rules. Nor did the Second Circuit find that UCC needed Federal Rules discovery in order to gain access to sources of proof. Instead, the Second Circuit, ignoring the fundamental principles of *forum non conveniens* and the stipulation offered by the Union of India, merely stated "[b]asic justice dictates that both sides be treated equally...." 809 F.2d at 205; Appendix A at p. A15.

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[3] The Second Circuit stated that an Indian judgment would be enforceable under the New York statute on enforcement of judgments, Art. 53, Recognition of Foreign Country Money Judgments, 7B N.Y. Civ. Prac. L.&R. §§5301-09 (McKinney 1978).

REASONS FOR GRANTING THE WRIT

This case presents a novel and important issue of federal law which should be, but has not been, settled by this Court: whether a court can impose conditions upon a plaintiff whose case is dismissed on the basis of *forum non conveniens*. The Second Circuit Court of Appeals, by imposing such a condition upon the Union of India, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The practical consequences of the decision, if unreviewed, will be to encourage defendants to file forum motions seeking not only to move actions to the forums of their choosing, but also to construct new rules of procedure for foreign forums. This is the epitome of forum shopping, and a perversion of the equitable principles upon which rests the doctrine of *forum non conveniens*.

The doctrine of *forum non conveniens* is a procedural device which grants a defendant, in the rare circumstances when convenience so dictates, the opportunity to move a case out of the plaintiff's chosen forum. The fundamental principle underlying *forum non conveniens* is the "ultimate inquiry" of "where the trial will best serve the convenience of the parties and the ends of justice." *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527 (1947). The threshold issue in this inquiry is the availability of an adequate alternative forum in which the litigation can proceed if dismissed from the United States. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 (1981), *reh. denied*, 455 U.S. 928 (1982).

In order to insure the adequacy of a foreign forum, courts routinely condition forum dismissals upon the consent by the defendant to various conditions, including submission to jurisdiction in the foreign forum, agreement to pay the foreign judgment, agreement to waive the defense of statute of limitations and agreement to provide witnesses and documents in the foreign forum. *Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984); De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir. 1983), *reh. denied*, 715 F.2d 577 (1983); *Mizokami Brothers of Arizona, Inc. v. Mobay Chemical Corp.*, 660 F.2d 712 (8th Cir. 1981).

In *Piper*, this Court noted its approval of forum dismissals with "the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims." 454 U.S. at 257 n. 25. *See*

also, Boskoff v. Transportes Aeroes Portugueses, 17 Av. Cas. (CCH) 18,613 (N.D. Ill. 1983) (dismissal conditioned on consent by all defendants to discovery under the Federal Rules); *Danser v. Firestone Tire & Rubber Co.,* 86 F.R.D. 120 (S.D.N.Y. 1980) (defendants required to consent to "all reasonable discovery requests").

This case presents the first instance of a court placing a condition upon a plaintiff whose case is dismissed on the basis of *forum non conveniens.* To both deny plaintiffs their traditional right to select a forum and force them to consent to conditions that will attach in the defendant's forum of choice constitutes a monumental abuse of the equitable powers from which a court draws its authority to impose conditions upon the grant of a *forum non conveniens* dismissal.

The facts of this case illustrate the duplicity that will necessarily accompany the attempt of any defendant to gain conditions that will inure to its benefit in the forum of its choosing. UCC represented to the District Court that the Indian rules of discovery were perfectly adequate for the litigation of this action in India. Any defendant seeking a forum dismissal must, of necessity, make such an assertion. Otherwise, the defendant would acknowledge the inadequacy of the alternative forum and thus fail to meet the threshold inquiry. A defendant must therefore investigate the total adequacy of the alternative forum before bringing a motion to dismiss. If a defendant believes any inadequacy exists, and that defendant nevertheless decides to bring a motion to dismiss, the defendant must live with that inadequacy regardless of what action the district court may take in the exercise of its equitable power to alleviate or ameliorate the impact of the inadequacy upon the plaintiff.

Even the Second Circuit, while granting mutual Federal Rules discovery, implicitly acknowledged the intellectual dilemma of its decision. The Second Circuit opinion does not explicitly state that the Union of India must "consent" to the "condition" of Federal Rules discovery. Indeed, the Second Circuit avoids the use of the two words, "consent" and "condition." However, the clear effect of the Second Circuit decision is to impose the acceptance of the condition of Federal Rules discovery upon the Union of India. Without accepting such a condition, the Union of India will be unable to proceed with Federal Rules discovery against UCC, which, by a finding of the District Court which was undisturbed by the Second

Circuit, is necessary for development of plaintiff's case. If the Union of India accepts the condition and seeks mutual Federal Rules discovery, significant delay will occur in the ultimate resolution of the case solely to permit UCC to engage in time-consuming discovery, which by UCC's own admission is not necessary to prepare its case for trial.

The Union of India respectfully requests this Court to exercise its power of supervision at this time for reasons of both policy and practicality. The ramifications of the Second Circuit decision extend beyond this case. The Second Circuit's decision stands as an invitation to all defendants in transnational litigation to both oppose the plaintiff's choice of a U.S. forum, and at the same time favorably modify the rules of procedure applicable to it in the foreign forum.

Already, each year federal courts decide dozens of motions for dismissal on the basis of *forum non conveniens.*[4] The numbers of such cases are likely to increase as more defendants seek to take advantage of the added incentive of both choosing the forum and the rules applicable in that forum. Such motions add considerable delay to proceeding on the merits while the U.S. courts decide which is the appropriate forum. These motions, if successful, will also further delay the proceedings after initiation in the alternative forum by imposing unnecessary and unwarranted procedures for the conduct of the litigation in the foreign forum.

The most direct way to eliminate unnecessary delays in this context would be to prohibit any appeal by a defendant who prevails on a motion for forum dismissal, the second issue raised in this cross-petition. It is axiomatic that a party may not appeal from a favorable decision, as such a party is not "aggrieved." *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326 (1980), *reh. denied,* 446 U.S. 947 (1980). UCC was awarded the full relief it sought in the District Court, an order dismissing the consolidated cases. The District Court's refusal to grant UCC discovery under the Federal Rules, in the absence of demonstrated need by UCC, cannot be considered prejudice sufficient to permit an appeal by respondent. *United States v. Bedford Associates,* 618 F.2d 904, 914 (2d Cir. 1980), *cert. denied,* 456 U.S. 914 (1982); *Yoffe v. Keller Industries, Inc.,* 580 F.2d 126, 130

[4] Federal district courts decided at least 38 *forum non conveniens* motions involving 25 foreign countries in 1986, according to a LEXIS search.

(5th Cir. 1978), *reh. denied,* 582 F.2d 982 (1978), *cert denied,* 440 U.S. 915 (1979). Neither can UCC be considered prejudiced by the District Court's grant of U.S.-style discovery to plaintiffs. This condition did not take away any of UCC's discovery rights under the Indian rules which, as UCC has stated, will allow it to develop all necessary evidence in India. Thus, UCC had no right to appeal the District Court's order of dismissal.

The Second Circuit compounded its error by considering and deleting, *sua sponte,* the second condition imposed by the District Court. This condition, which required UCC to satisfy any judgment rendered by an Indian court, has frequently been imposed on a defendant by a court granting a motion for dismissal on the basis of *forum non conveniens. Dowling, supra; De Oliveira, supra; Panama Processes, S.A. v. Cities Service Co.,* 650 F.2d 408 (2d Cir. 1981). The District Court, faced with the prospect of deciding the largest case involving a motion for dismissal on the basis of *forum non conveniens* in the history of American jurisprudence, clearly must have been aware of prior cases setting forth this condition. Similarly, it must be assumed that the District Court was aware of the law in New York with respect to the enforcement of a foreign money judgment. Indeed, the presumption is that a court is knowledgeable about, and aware of, the laws which prevail in the court's jurisdiction. *Luther v. Borden,* 48 U.S. 1, 46 (7 How. 1849); *Rader v. Cliburn,* 476 F.2d 182, 184 (6th Cir. 1973).

Accordingly, the Second Circuit's "assumption" that the District Court's condition requiring UCC to satisfy any judgment was based upon its ignorance of the law of New York is contrary to the normal legal presumption. Moreover, there is no support whatsoever in the record below from which the Second Circuit could have based such a presumption. To the contrary, the District Court opinion demonstrates that this condition was imposed in response to specific concerns raised by the plaintiffs relating to the adequacy of the Indian forum. Thus, the District Court prefaced its discussion of the condition requiring satisfaction of the judgment as follows:

> Plaintiff's final contention as to the inadequacy of the Indian forum is that a judgment rendered by an Indian court cannot be enforced in the United States without resort to further extensive litigation.

634 F.Supp. at 851-52; Appendix B at p. A29.

This quote demonstrates that the District Court was aware of the fact that the Union of India could seek to enforce a judgment of the Indian courts by litigating that judgment under applicable United States law. The District Court's condition was clearly intended to avoid extensive litigation by requiring the defendant to consent to be bound by an Indian court judgment wherever enforcement is sought. The District Court satisfied its purpose in this regard by obtaining the consent of UCC to satisfy the Indian court judgment unless the defendant could establish that minimal requirements of due process were not met. Stated another way, except for raising due process as a defense to the judgment, no other issue could be litigated in the event the Union of India is required to bring an action to satisfy an Indian court judgment.

Contrary to the Second Circuit's decision, the purpose served by this condition is not "fully served by New York's statute providing for recognition of foreign-country money judgments." 809 F.2d at 205; Appendix A at p. A14. In addition to permitting defenses to foreign judgments based upon due process grounds, the New York statute relied upon by the Second Circuit may also permit certain other discretionary defenses not based upon due process to be raised. *See* 7B N.Y. Civ. Prac. L. & R. § 5304(b). It is these defenses, together with any other non-due-process defenses which UCC may be able to articulate or concoct, that were intended to be eliminated by the District Court's condition.

UCC consented to this condition without reservation, and significantly without appeal. Under these circumstances it was fundamental error on the part of the Second Circuit to delete this condition based upon an erroneous assumption and speculation not supported either in the record below, or in the law. In deleting the condition the Second Circuit so widely departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For all of the above reasons, the Union of India requests that this Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984.

Docket 86-7517, 86-7589 and 86-7637.

United States Court of Appeals,
Second Circuit.

Argued Nov. 24, 1986.

Decided Jan. 14, 1987.

Before MANSFIELD, PRATT and ALTIMARI, Circuit Judges.

MANSFIELD, Circuit Judge.*

This appeal raises the question of whether thousands of claims by citizens of India and the Government of India arising out of the most devastating industrial disaster in history—the deaths of over 2,000 persons and injuries of over 200,000 caused by lethal gas known as methyl isocyanate which was released from a chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India—should be tried in the United States or in India. The Southern District of New York, John F. Keenan, *Judge,* granted the motion of Union Carbide Corporation (UCC), a defendant in some 145 actions commenced in federal courts in the United States, to dismiss these actions on grounds of *forum non conveniens* so that the claims may be tried in India, subject to certain conditions. The individual plaintiffs appeal from the order and the court's denial of their motion for a fairness hearing on a proposed settlement. UCC and the Union of India (UOI), a plaintiff, cross-appeal. We eliminate two of the conditions imposed by the district court and in all other respects affirm that court's orders.

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* Judge Mansfield prepared this opinion prior to his death on January 7, 1987. Except for minor nonsubstantive, editorial changes, it reflects his work, concurred in by the other members of the panel.

The accident occured on the night of December 2-3, 1984, when winds blew the deadly gas from the plant operated by UCIL into densely occupied parts of the city of Bhopal. UCIL is incorporated under the laws of India. Fifty and nine-tenths percent of its stock is owned by UCC, 22% is owned or controlled by the government of India, and the balance is held by approximately 23,500 Indian citizens. The stock is publicly traded on the Bombay Stock Exchange. The company is engaged in the manufacture of a variety of products, including chemicals, plastics, fertilizers and insecticides, at 14 plants in India and employs over 9,000 Indian citizens. It is managed and operated entirely by Indians in India.

Four days after the Bhopal accident, on December 7, 1984, the first of some 145 purported class actions in federal district courts in the United States was commenced on behalf of victims of the disaster. On January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned the actions to the Southern District of New York where they became the subject of a consolidated complaint filed on June 28, 1985.

In the meantime, on March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, granting to its government, the UOI, the exclusive right to represent the victims in India or elsewhere. Thereupon the UOI, purpoting to act in the capacity of *parens patriae*, and with retainers executed by many of the victims, on April 8, 1985, filed a complaint in the Southern District of New York on behalf of all victims of the Bhopal disaster, similar to the purported class action complaints already filed by individuals in the United States. The UOI's decision to bring suit in the United States was attributed to the fact that, although numerous lawsuits (by now, some 6,500) had been instituted by victims in India against UCIL, the Indian courts did not have jurisdiction over UCC, the parent company, which is a defendant in the United States actions. The actions in India asserted claims not only against UCIL but also against the UOI, the State of Madhya Pradesh, and the Municipality of Bhopal, and were consolidated in the District Court of Bhopal.

By order dated April 25, 1985, Judge Keenan appointed a three-person Executive Committee to represent all plaintiffs in the pre-trial proceedings. It consisted of two lawyers representing the individual plaintiffs and one representing the UOI. On July 31, 1985, UCC moved to dismiss the complaints on grounds of *forum non conveniens*, the plaintiffs' lack of standing to bring the actions in the United States, and

their purported attorneys' lack of authority to represent them. After several months of discovery related to *forum non conveniens,*[1] the individual plaintiffs and the UOI opposed UCC's motion. After hearing argument on January 3, 1986, the district court, on May 12, 1986, 634 F.Supp. 842, in a thoroughly reasoned 63-page opinion granted the motion, dismissing the lawsuits before it on condition that UCC:

> (1) consent to the jurisdiction of the courts of India and continue to waive defenses based on the statute of limitations,
>
> (2) agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance "comport with the minimal requirements of due process," and
>
> (3) be subject to discovery under the Federal Rules of Civil Procedure of the United States.

On June 12, 1986, UCC accepted these conditions subject to its right to appeal them; and on June 24, 1986, the district court entered its order of dismissal. In September 1986 the UOI, acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants against UCC in the District Court of Bhopal, where many individual suits by victims of the disaster were then pending.

In its opinion dismissing the actions the district court analyzed the *forum non conveniens* issues, applying the standards and weighing the factors suggested by the Supreme Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 955 (1947), and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). At the outset Judge Keenan concluded, in accordance with the Court's expressed views in *Piper* that, since the plaintiffs were not residents of the United States but of a foreign country, their choice of the United States as a forum would not be given the deference to which it would be entitled if this coutry were their home. *See Piper,* 454 U.S. at 256, 102 S.Ct. at 266. Following the dictates of *Piper,* the district court declined to compare the advantages and disadvantages to the respective parties of American versus Indian Laws or to determine the impact upon plaintiffs' claims of the laws of India, where UCC had acknowledged that it would make itself amenable to process, except to ascertain

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[1]UCC briefed only the dispositive issue of *forum non conveniens* before the district court and suggested that the other two grounds for its motion need not be considered. Discovery was therefore limited to the issue of *forum non conveniens;* and the district court based its dismissal solely on that doctrine.

whether India provided an adequate alternative forum, as distinguished from no remedy at all. Judge Keenan reviewed thoroughly the affidavits of experts on India's law and legal system, which described in detail its procedural and substantive aspects, and concluded that, despite some of the Indian system's disadvantages, it afforded an adequate alternative forum for the enforcement of plaintiffs' claims.

The Indian judiciary was found by the court to be a developed, independent and progressive one, which has demonstrated its capability of circumventing long delays and backlogs prevalent in the Indian courts' handling of ordinary cases by devising special expediting procedures in extraordinary cases, such as by directing its High Court to hear them on a daily basis, appointing special tribunals to handle them, and assigning daily hearing duties to a single judge. He found that Indian courts have competently dealt with complex technological issues. Since the Bhopal Act provides that the case may be treated speedily, effectively and to the best advantage of the claimants, and since the Union of India represents the claimants, the prosecution of the claims is expected to be adequately staffed by the Attorney General or Solicitor General of India.

The tort law of India, which is derived from common law and British precedent, was found to be suitable for resolution of legal issues arising in cases involving highly complex technology. Moreover, Indian courts would be in a superior position to construe and apply applicable Indian laws and standards than would courts of the United States. Third parties may be interpleaded under Order 1, Rule 10(2) of the Indian Code of Civil Procedure, and defendants may seek contribution from third parties. The absence in India of a class action procedure comparable to that in federal courts here was found not to deprive the plaintiffs of a remedy, in view of existing Indian legal authorization for "representative" suits under Order 1, Rule 8 of the Indian Code of Civil Procedure, which would permit an Indian court to create representative classes. Judge Keenan further found that the absence of juries and contingent fee arrangements in India would not deprive the claimants of an adequate remedy.

In the two areas bearing upon the adequacy of the Indian forum the district court decided to impose somewhat unusual conditions on the transfer of the American cases to India. One condition dealt with pre-trial discovery. Indian courts, following the British pattern, permit parties to have pretrial discovery of each other through written inter-

rogatories, liberal inspection of documents and requests for admission. Non-party witnesses can be interviewed and summoned to appear at trial or to produce documents. *See* Indian Code Civ. Proc., Order 16, Rule 6. Witnesses unable to appear at trial are sometimes permitted to give evidence by means of affidavits. *See id.* Order 19. Discovery in India, however, as in Britain, is limited to evidence that may be admitted at trial. Litigants are not permitted to engage in wide-ranging discovery of the type authorized by Fed.R.Civ.P. 26(b), which allows inquiry into any unprivileged matter that could reasonably lead to the discovery of admissible evidence.

Judge Keenan, concluding that the Indian system might limit the victims' access to sources of proof, directed that dismissal of the actions on grounds of *forum non conveniens* must be conditioned on UCC's consent to discovery of it in accordance with the Federal Rules of Civil Procedure after the cases were transferred to India. He added, "While the Court feels that it would be fair to bind the plaintiffs to American discovery rules, too, it has no authority to do so."

Another condition imposed by the district court upon dismissal on grounds of *forum non conveniens* dealt with the enforceability in the United States of any judgment rendered by an Indian court in the cases. Judge Keenan, expressing the view that an Indian judgment might possibly not be enforceable in the United States, provided in his order that UCC must "agree to satisfy any judgment rendered by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process."

As the district court found, the record shows that the private interests of the respective parties weigh heavily in favor of dismissal on grounds of *forum non conveniens*. The many witnesses and sources of proof are almost entirely located in India, where the accident occurred, and could not be compelled to appear for trial in the United States. The Bhopal plant at the time of the accident was operated by some 193 Indian nationals, including the managers of seven operating units employed by the Agricultural Products Division of UCIL, who reported to Indian Works Mangers in Bhopal. The plant was maintained by seven functional departments employing over 200 more Indian nationals. UCIL kept at the plant daily, weekly and monthly records of plant operations and records of maintenance as well as records of the plant's Quality Control, Purchasing and Stores Branches, all operated by Indian

employees. The great majority of documents bearing on the design, safety, start-up and operation of the plant, as well as the safety training of the plant's employees, is located in India.[2] Proof to be offered at trial would be derived from interviews of these witnesses in India and study of the records located there to determine whether the accident was caused by negligence on the part of the management or employees in the operation of the plant, by fault in its design, or by sabotage. In short, India has greater ease of access to the proof than does the United States.

The plaintiffs seek to prove that the accident was caused by negligence on the part of UCC in originally contributing to the design of the plant and its provision for storage of excessive amounts of the gas at the plant. As Judge Keenan found, however, UCC's participation was limited and its involvement in plant operations terminated long before the accident. Under 1973 agreements negotiated at arms-length with UCIL, UCC did provide a summary "process design package" for construction of the plant and the services of some of its technicians to monitor the progress of UCIL in detailing the design and erecting the plant. However, the UOI controlled the terms of the agreements and precluded UCC from exercising any authority to "detail design, erect and commission the plant," which was done independently over the period from 1972 to 1980 by UCIL process design engineers who supervised, among many others, some 55 to 60 Indian engineers employed by the Bombay engineering firm of Humphreys and Glasgow. The preliminary process design information furnished by UCC could not have been used to construct the plant. Construction required the detailed process design and engineering data prepared by hundreds of Indian engineers, process designers and subcontractors. During the ten years spent constructing the plant, its design and configuration

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[2]At oral argument UOI's counsel stated that UCC refused UOI's offer to furnish copies of some of the documents to UCC in the United States. The district court, on the other hand, found that following the disaster India's Central Bureau of Investigation seized, among other documents, daily, weekly and monthly records of the Bhopal plant operations. UCC states that of the 78,000 pages of documents seized, some 36,000 are plant operation records, of which 1,700 pages relate to plant maintenance in 1983 and 1984.

underwent many changes.

The vital parts of the Bhopal plant, including its storage tank, monitoring instrumentation, and vent gas scrubber, were manufactured by Indians in India. Although some 40 UCIL employees were given some safety training at UCC's plant in West Virginia, they represented a small fraction of the Bhopal plant's employees. The vast majority of plant employees were selected and trained by UCIL in Bhopal. The manual for start-up of the Bhopal plant was prepared by Indians employed by UCIL.

In short, the plant has been constructed and managed by Indians in India. No Americans were employed at the plant at the time of the accident. In the five years from 1980 to 1984, although more than 1,000 Indians were employed at the plant, only one American was employed there and he left in 1982. No Americans visited the plant for more than one year prior to the accident, and during the 5-year period before the accident the communications between the plant and the United States were almost nonexistent.

The vast majority of material witnesses and documentary proof bearing on causation of and liability for the accident is located in India, not the United States, and would be more accessible to an Indian court than to a United States court. The records are almost entirely in Hindi or other Indian languages, understandable to an Indian court without translation. The witnesses for the most part do not speak English but Indian languages understood by an Indian court but not by an American court. These witnesses could be required to appear in an Indian court but not in a court of the United States. Although witnesses in the United States could not be subpoenaed to appear in India, they are comparatively few in number and most are employed by UCC which, as a party, would produce them in India, with lower overall transportation costs than if the parties were to attempt to bring hundreds of Indian witnesses to the United States. Lastly, Judge Keenan properly concluded that an Indian court would be in a better postition to direct and supervise a viewing of the Bhopal plant, which was sealed after the accident. Such a viewing could be of help to a court in determining liabilty issues.

After a thorough review, the district court concluded that the public interest concerns, like the private ones, also weigh heavily in favor of India as the situs for trial and disposition of the cases. The accident and all relevant events occurred in India. The victims, over 200,000 in

number, are citizens of India and located there. The witnesses are almost entirely Indian citizens. The Union of India has a greater interest than does the United States in facilitating the trial and adjudication of the victims' claims. Despite the contentions of plaintiffs and amici that it would be in the public interest to avoid a "double standard" by requiring an American parent corporation (UCC) to submit to the jurisdiction of American courts, India has a stronger countervailing interest in adjudicating the claims in its courts according to its standards rather than having American values and standards of care imposed upon it.

India's interest is increased by the fact that it has for years treated UCIL as an Indian national, subjecting it to intensive regulations and governmental supervision of the construction, development and operation of the Bhopal plant, its emissions, water and air pollution, and safety precautions. Numerous Indian govenment officials have regularly conducted on-site inspections of the plant and approved its machinery and equipment, including its facilities for storage of the lethal methyl isocyanate gas that escaped and caused the disaster giving rise to the claims. Thus India has considered the plant to be an Indian one and the disaster to be an Indian problem. It therefore has a deep interest in ensuring compliance with its safety standards. Moreover, plaintiffs have conceded that in view of India's strong interest and its greater contacts with the plant, its operations, its employees, and the victims of the accident, the law of India, as the place where the tort occurred, will undoubtedly govern. In contrast, the American interests are relatively minor. Indeed, a long trial of the 145 cases here would unduly burden an already overburdened court, involving both jury hardship and heavy expense. It would face the court with numerous practical difficulties, including the almost impossible task of attempting to understand extensive relevant Indian regulations published in a foreign language and the slow process of receiving testimony of scores of witnesses through interpreters.

Having made the foregoing findings, Judge Keenan dismissed the actions against UCC on grounds of *forum non conveniens* upon the conditions indicated above, after obtaining UCC's consent to those conditions subject to its right to appeal the order. After the plaintiffs filed their notice of appeal, UCC and the Union of India filed cross appeals.

Upon these appeals, the plaintiffs continue to oppose the dismissal. The Union of India, however, has changed its position and now

supports the district court's order. UCC, as it did in the district court, opposes as unfair the condition that it submit to discovery pursuant to the Federal Rules of Civil Procedure without reciprocally obligating the plaintiffs and Union of India to be subject to discovery on the same basis so that both sides might be treated equally, giving each the same access to the facts in the others' possession.

Upon argument of the appeal, UCC also took the position that the district court's order requiring it to satisfy any Indian court judgment was unfair unless some method were provided, such as continued availability of the district court as a forum, to ensure that any denial of due process by the Indian courts could be remedied promptly by the federal court here rather than delay resolution of the issue until termination of the Indian court proceedings and appeal, which might take several years. UCC's argument in this respect was based on the sudden issuance by the Indian court in Bhopal of a temporary order freezing all of UCC's assets, which could have caused it irreparable injury if it had been continued indefinitely,[3] and by the conflict of interest posed by the UOI's position in the Indian courts where, since the UOI would appear both as a plaintiff and a defendant, it might as a plaintiff voluntarily dismiss its claims against itself as a defendant or, as a co-defendant with UCC, be tempted to shed all blame upon UCC even though the UOI had in fact been responsible for supervision, regulation and safety of UCIL's Bhopal plant.

DISCUSSION

The standard to be applied in reviewing the district court's *forum non conveniens* dismissal was clearly expressed by the Supreme Court in *Piper Aircraft Co. v. Reyno, supra,* 454 U.S. at 257, 102 S.Ct. at 266, as follows:

> "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."

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[3]The Indian court's temporary restraining order has since been dissolved upon UCC's agreement to maintain sufficient assets to satisfy a judgment rendered against it in India.

Having reviewed Judge Keenan's detailed decision, in which he thoroughly considered the comparative adequacy of the forums and the public and private interests involved, we are satisfied that there was no abuse of discretion in his granting dismissal of the action. On the contrary, it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal. *See Schertenleib v. Traum*, 589 F.2d 1156, 1164 (2d Cir.1978); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir.1983) (per curiam). Practically all relevant factors demonstrate that transfer of the cases to India for trial and adjudication is both fair and just to the parties.

Plaintiffs' principal contentions in favor of retention of the cases by the district court are that deference to the plaintiffs' choice of forum has been inadequate, that the Indian courts are insufficiently equipped for the task, that UCC has its principal place of business here, that the most probative evidence regarding negligence and causation is to be found here, that federal courts are much better equipped through experience and procedures to handle such complex actions efficiently than are Indian courts, and that a transfer of the cases to India will jeopardize a $350 million settlement being negotiated by plaintiffs' counsel. All of these arguments, however, must be rejected.

Little or no deference can be paid to the plaintiffs' choice of a United States forum when all but a few of the 200,000 plaintiffs are Indian citizens located in India who, according to the UOI, have revoked the authorizations of American counsel to represent them here and have substituted the UOI, which now prefers Indian courts. The finding of our district court, after exhaustive analysis of the evidence, that the Indian courts provide a reasonably adequate alternative forum cannot be labelled clearly erroneous or an abuse of discretion.

The emphasis placed by plaintiffs on UCC's having its domicile here, where personal jurisdiction over it exists, is robbed of significance by its consent to Indian jurisdiction. Plaintiffs' contention that the most crucial and probative evidence is located in the United States is simply not in accord with the record or the district court's findings. Although basic design programs were prepared in the United States and some assistance furnished to UCIL at the outset of the 10-year period during which the Bhopal plant was constructed, the proof bearing on the issues to be tried is almost entirely located in India. This includes the principal witnesses and documents bearing on the development and construction of the plant, the detailed designs, the implementation of plans, the

operation and regulation of the plant, its safety precautions, the facts with respect to the accident itself, and the deaths and injuries attributable to the accident.

Although the plaintiffs' American counsel may at one time have been close to reaching a $350 million settlement of the cases, no such settlement was ever finalized. No draft joint stipulation in writing or settlement agreement appears to have been prepared, much less approved by the parties. No petition for certification of a settlement class under Fed.R. Civ.P. 23 has ever been presented. *See Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982), *cert. denied,* 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983). Most important, the UOI, which is itself a plaintiff and states that it now represents the Indian plaintiffs formerly represented by American counsel, is firmly opposed to the $350 million "settlement" as inadequate. Under these circumstances, to order a Rule 23 "fairness" hearing would be futile. The district court's denial of the American counsels' motion for such a hearing must accordingly be affirmed.

The conditions imposed by the district court upon its *forum non conveniens* dismissal stand on a different footing. Plaintiffs and the UOI, however, contend that UCC, having been granted the *forum non conveniens* dismissal that it sought and having consented to the district court's order, has waived its right to appellate review of these conditions. We disagree. UCC expressly reserved its right to appeal Judge Keenan's order. Moreover, it has made a sufficient showing of prejudice from the second and third conditions of the court's order to entitle it to seek appellate review. UCC's position is comparable to that of a prevailing party which, upon being granted injunctive relief, is permitted to challenge by appeal conditions attaching to the injunction that are found to be objectionable. *United States v. Bedford Assocs.,* 618 F.2d 904, 913-16 (2d Cir.1980). Similarly, conditions imposed by the court upon dismissals without prejudice under Fed.R.Civ.P. 41(a)(2) may be appealed by the plaintiff when they prejudice the plaintiff. *LeCompte v. Mr. Chip, Inc.,* 528 F.2d 601 (5th Cir.1976).

All three conditions of the dismissal are reviewable since plaintiffs have appealed the district court's order and UCC has cross-appealed "from each judgment and order appealed in whole or part by any plaintiff." We therefore have jurisdiction over the entire case and may in the interest of justice modify the district court's order. Cf. *In re Barnett,* 124 F.2d 1005, 1009 (2d Cir.1942) ("We are clear that we have the power

to order a reversal as to [parties in interest] even though they did not appeal."); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir.1977) ("Once a timely notice of appeal has been filed from a judgment, it gives us jurisdiction to review the entire judgment; rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require.") (citing *In re Barnett, supra).*

The first condition, that UCC consent to the Indian court's personal jurisdiction over it and waive the statute of limitations as a defense, are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition. *See, e.g., Schertenleib, supra,* 589 F.2d at 1166; *Bailey v. Dolphin Int'l, Inc.*, 697 F.2d 1268, 1280 (5th Cir.1983). The remaining two conditions, however, pose problems.

In requiring that UCC consent to enforceability of an Indian judgment against it, the district court proceeded at least in part on the erroneous assumption that, absent such a requirement, the plaintiffs, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary. Under New York law, which governs actions brought in New York to enforce foreign judgments, *see Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1318 (2d Cir. 1973), *cert. denied,* 416 U.S. 986, 94 S.Ct. 2389, 40 L.Ed.2d 763 (1974, a foreign country judgment that is final, conclusive and enforceable where rendered must be recognized and will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" except that it is not deemed to be conclusive if:

> "1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> "2. the foreign court did not have personal jurisdiction over the defendant."

Art. 53, Recognition of Foreign Country Money Judgments, 7B N.Y.Civ.Prac.L. & R. §§ 5301-09 (McKinney 1978). Although § 5304 further provides that under certain specified conditions a foreign coun-

try judgment need not be recognized,[4] none of these conditions would apply to the present cases except for the possibility of failure to provide UCC with sufficient notice of proceedings or the existence of fraud in obtaining the judgment, which do not presently exist but conceivably could occur in the future.[5]

UCC contends that Indian courts, while providing an adequate alternative forum, do not observe due process standards that would be required as a matter of course in this country. As evidence of this apprehension it points to the haste with which the Indian court in Bhopal issued a temporary order freezing its assets throughout the world and the possibility of serious prejudice to it if the UOI is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings. It argues that we should protect it against such denial of due process by authorizing Judge Keenan to retain the authority, after *forum non conveniens* dismissal of

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[4]Section 5304 provides in pertinent part:

"(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based in repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of juridiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."

[5]New York's article 53 is based upon the Uniform Foreign Money Judgments Recognition Act, *see* U.L.A. 263 (1962), which has been adopted by 15 states in addition to New York. In states that have not adopted the Uniform Money Judgments Recognition Act, foreign judgments may be recognized according to priciples of comity. *See Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

UCC, as a New York business corporation, would be subject to personal jurisdiction in a court sitting in New York. An Indian money judgment could be enforced against UCC in New York by means of either an action on the judgment or a motion for summary judgment in lieu of complaint. *See* 7B N.Y.Civ.Prac.L. & R. § 5303. In either case, once converted into a New York judgment, the judgment would be enforceable as a New York judgment, and thus entitled to the full faith and credit of New York's sister states.

the cases here, to monitor the Indian court proceedings and be available on call to rectify in some undefined way any abuses of UCC's right to due process as they might occur in India.

UCC's proposed remedy is not only impractical but evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous. The district court's jurisdiction is limited to proceedings before it in this country. Once it dismisses those proceedings on grounds of *forum non conveniens* it ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to enforce here a final and conclusive Indian money judgment. Nor could we, even if we attempted to retain some sort of supervisory jurisdiction, impose our due process requirements upon Indian courts, which are governed by their laws, not ours. The concept of shared jurisdictions is both illusory and unrealistic. The parties cannot simultaneously submit to both jurisdictions the resolution of the pre-trial and trial issues when there is only one consolidated case pending in one court. Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country.

We are concerned, however, that as it is written the district court's requirement that UCC consent to the enforcement of a final Indian judgment, which was imposed on the erroneous assumption that such a judgment might not otherwise be enforceable in the United States, may create misunderstandings and problems of construction. Although the order's provision that the judgment "comport with the *minimal* requirements of due process" (emphasis supplied) probably is intended to refer to "due process" as used in the New York Foreign Country Money Judgments Law and others like it, there is the risk that it may also be interpreted as providing for a lesser standard than we would otherwise require. Since the court's condition with respect to enforceability of any final Indian judgment is predicated on an erroneous legal assumption and its "due process" language is ambiguous, and since the district court's purpose is fully served by New York's statute providing for recognition of foreign country money judgments, it was error to impose this condition upon the parties.

We also believe that the district court erred in requiring UCC to consent (which UCC did under protest and subject to its right of appeal) to broad discovery of it by the plaintiffs under the Federal Rules of Civil Procedure when UCC is confined to the more limited discovery autho-

rized under Indian law. We recognize that under some circumstances, such as when a moving defendant unconditionally consents thereto or no undiscovered evidence of consequence is believed to be under the control of a plaintiff or co-defendant, it may be appropriate to condition a *forum non conveniens* dismissal on the moving defendant's submission to discovery under the Federal Rules without requiring reciprocal discovery by it of the plaintiff. *See, e.g., Piper Aircraft v. Reyno, supra,* 454 U.S. at 257 n. 25, 102 S.Ct. at 267 n. 25 (suggesting that district courts can condition dismissal upon a defendant's agreeing to provide all relevant records); *Ali v. Offshore Co.,* 753 F.2d 1327, 1334 n. 16 (5th Cir. 1985) (same); *Boskoff v. Transportes Aereos Portugueses,* 17 Av. Cas. (CCH) 18,613, at 18,616 (N.D.Ill. 1983) (accepting defendant's voluntary commitment to provide discovery in foreign forum according to Federal Rules). Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Application of this fundamental principle in the present case is especially appropriate since the UOI, as the sovereign government of India, is expected to be a party to the Indian litigation, possibly on both sides.

For these reasons we direct that the condition with respect to the discovery of UCC under the Federal Rules of Civil Procedure be deleted without prejudice to the right of the parties to have reciprocal discovery of each other on equal terms under the Federal Rules, subject to such approval as may be required of the Indian court in which the case will be pending. If, for instance, Indian authorities will permit mutual discovery pursuant to the Federal Rules, the district court's order, as modified in accordance with this opinion, should not be construed to bar such procedure. In the absence of such a court-sanctioned agreement, however, the parties will be limited by the applicable discovery rules of the Indian court in which the claims will be pending.

As so modified the district court's order is affirmed.

APPENDIX B

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984.

Misc. No. 21-38 (JFK).

United States District Court,
S.D. New York.

Decided May 12, 1986.

As Amended June 10, 1986.

OPINION and ORDER

KEENAN, District Judge.

FACTUAL BACKGROUND

On the night of December 2–3, 1984 the most tragic industrial disaster in history occurred in the city of Bhopal, state of Madhya Pradesh, Union of India. Located there was a chemical plant owned and operated by Union Carbide India Limited ("UCIL"). The plant, situated in the northern sector of the city, had numerous hutments adjacent to it on its southern side which were occupied by impoverished squatters. UCIL manufactured the pesticides Sevin and Temik at the Bhopal plant at the request of, and with the approval of, the Government of India. (Affidavit of John MacDonald ("MacDonald Aff.") at 2). UCIL was incorporated under Indian law in 1934. 50.9% of its stock is owned by the defendant, Union Carbide Corporation, a New York corporation. (MacDonald Aff. at 1). Methyl isocyanate (MIC), a hightly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the plant in substantial quantities for reasoning not yet determined.

The prevailing winds on the early morning of December 3, 1984 were from Northwest to Southeast. They blew the deadly gas into the overpopulated hutments adjacent to the plant and into the most densely

occupied parts of the city. The results were horrendous. Estimates of deaths directly attributable to the leak range as high as 2,100. No one is sure exactly how many perished. Over 200,000 people suffered injuries—some serious and permanent—some mild and temporary. Livestock were killed and crops damaged. Businesses were interrupted.

On December 7, 1984 the first lawsuit was filed by American lawyers in the United States on behalf of thousands of Indians. *Dawani et al. v. Union Carbide Corp.*, S.D.W.Va. (84-2479). Since then 144 additional actions have been commenced in federal courts in the United States. The actions have all been joined and assigned by the Judicial Panel on Multidistrict Litigation to the Southern District of New York by order of February 6, 1985, 601 F.Supp. 1035.

The individual federal court complaints have been superseded by a consolidated complaint filed on June 28, 1985.

The Indian Government on March 29, 1985 enacted legislation, the Bhopal Gas Leak Disaster (Processing of Claims) Act (21 of 1985) ("Bhopal Act"), providing that the Government of India has the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy. Pursuant to the Bhopal Act, the Union of India, on April 8, 1985, filed a complaint with this Court setting forth claims for relief similar to those in the consolidated complaint of June 28, 1985.

By order of April 25, 1985 this Court established a Plaintiffs' Executive Committee, comprised of F. Lee Bailey and Stanley M. Chesley, Esqs., who represented individual plaintiffs and Michael V. Ciresi, Esq., whose firm represents the Union of India. Jack S. Hoffinger, Esq., who represents individual plaintiffs, was appointed liaison counsel for the Plaintiffs' Executive Committee.[1]

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[1]All counsel on the Plaintiffs' Executive Committee were most professional and helpful to the Court in this case. Mr. Hoffinger agreed to proceed *pro bono* in this case, and waived any possible fee. The Court has been informed that neither Mr. Hoffinger, nor anyone else on the Plaintiffs' Executive Committee, nor anyone in their law firms went to India on the days immediately following the tragedy to "sign up" Indian plaintiffs. The behavior of many American lawyers who went to Bhopal, India during December 1984 and January 1985 is not before this Court on this motion. Suffice it to say that those members of the American bar who travelled the 8,200 miles to Bhopal in those months did little to better the American image in the Third World—or anywhere else. None of them were on the Plaintiffs' Executive Committee.

On September 24, 1985, pursuant to the Bhopal Act, the Central Government of India framed a "scheme" for the Registration and Processing of Claims arising out of the disaster. According to the Union of India's counsel, over 487,000 claims have been filed in India pursuant to the "scheme."

There presently are 145 actions filed in the United States District Court for the Southern District of New York under the Judicial Panel for Multidistrict Litigation's order of February 6, 1985, involving approximately 200,000 plaintiffs.

Before this Court is a motion by the defendant Union Carbide Corporation ("Union Carbide") to dismiss the consolidated action on the grounds of *forum non conveniens.*

DISCUSSION

The doctrine of *forum non conveniens* allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute. In support of its position that the consolidated action before the Court should be transferred to a more convenient forum within the Union of India pursuant to this doctrine, Union Carbide relies on the United States Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). The plaintiffs cite numerous other lower United States federal court cases in their briefs and seek to distinguish the Supreme Court's decisions from this case. Of course, *Gilbert* and *Piper* are the touchstones in sorting out and examining the contentions of both sides to this motion on the various factors bearing on convenience.

Piper teaches a straightforward formulation of the doctrine of *forum non conveniens.* A district court is advised to determine first whether the proposed alternative forum is "adequate." This inquiry should proceed in the order followed below. Then as a matter within its "sound discretion," *Piper* at 257, 102 S.Ct. at 266, the district court should consider relevant public and private interest factors, and reasonably balance those factors, in order to determine whether dismissal is favored. This Court will approach the various concerns in the same direct manner in which *Piper* and *Gilbert* set them out.

At this juncture, it would be appropriate to discuss the presumptions on a *forum non conveniens* motion. In *Piper,* the Court discussed its earlier finding in *Koster v. Lumbermens Mutual Casualty Co.,* 330

U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947), which suggested that a plaintiff's choice of forum was entitled to great deference when the forum chosen was the home of the plaintiff. This presumption was based on the fact that the choice of the home forum indicated a reasonable assumption that the choice was convenient. *Koster* at 524, 67 S.Ct. at 831. Conversely, the *Piper* Court found:

> When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Piper 454 U.S. at 256, 102 S.Ct. at 266 (footnote omitted).

In the case now before the court, in which the plaintiffs, including the Union of India, are foreign, and share a home forum which is not the instant forum, the assumption that this forum is convenient is not completely reasonable. The foreign plaintiff's choice of the United States forum "deserves less deference" than would be accorded a United States citizen's choice. This Court will apply the presumption in favor of plaintiffs' choice of forum with "less than maximum force." *Piper* at 261, 102 S.Ct. at 268. *See* note 23 at 864, *infra.*

1. Preliminary Considerations.

"At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Piper* at 254, n. 22, 102 S.Ct. at 265, n. 22. The elements of that inquiry are set forth in *Piper*. First, the Court said, "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper* at 254, n. 22, 102 S.Ct. at 265, n. 22, quoting *Gilbert* 330 U.S. at 506–507, 67 S.Ct. at 842. *Gilbert* states that the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process."

Extending the limited inquiry of *Gilbert;* the *Piper* Court delved into the relevance of the substantive and procedural differences in law which would be applied in the event a case was transferred on the grounds of *forum non conveniens.* The *Piper* Court determined that it was theoretically inconsistent with the underlying doctrine of *forum non conveniens,* as well as grossly impractical, to consider the impact of the putative transferee forum's law on the plaintiff in its decision on a *forum non conveniens* motion: "[I]f conclusive or substantial weight

were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless." *Piper* 454 U.S. at 250, 102 S.Ct. at 263.[2]

The Court listed numerous practical considerations which led to its conclusion that an unfavorable change in law for plaintiff was not a relevant factor in the forum analysis. First, the Court observed that if the chance of a change in law were given substantial weight, choice of law questions would "become extremely important." *Piper* at 251, 102 S.Ct. at 263. U.S. courts would "have to compare the rights, remedies, and procedures available" within the two proposed alternative forums, to determine whether a disadvantageous change in law would occur upon transfer. *Id.* Since "[t]he doctrine of *forum non conveniens,* however, is designed in part to help courts avoid conducting complex exercises in comparative law," the change in law analysis would subvert the doctrine itself. *Id.* Thus, a court engaged in the inquiry regarding the existence and adequacy of an alternative forum should not hinge its decision on an unfavorable change in law.[3]

Another practical concern relating to the "change in law" inquiry was discussed by the *Piper* court. Based on the liberality of United States federal law as compared to much foreign law with respect to availability of strict liability for tort, malleable and diverse choice of law rules among the 50 states, availability of jury trials, contingent fee arrangements and extensive discovery provisions, the court observed that a change of forum might frequently involve an unfavorable change of law for foreign plaintiffs suing American defendants. *Piper* at 252, n. 18, 102 S.Ct. at 264, n. 18. Consequently, if the unfavorable change in law were a major factor in the analysis:

> [T]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

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[2]The Court found a theoretical flaw in the opposite rule, as set forth by the Third Circuit. Noting that a plaintiff would choose the forum with the most favorable choice of law rules in the first instance, "if the possibility of an unfavorable change in substantive law is given weight in the *forum non conveniens* inquiry, dismissal would rarely be proper." *Piper* at 250, 102 S.Ct. at 263.

[3]Similarly, the Court determined that "the possibility of a change in law favorable to defendant should not be considered." *Piper* at 252, n. 19, 102 S.Ct. at 264, n. 19.

Piper at 252, 102 S.Ct. at 264 (footnotes omitted).

At the point, however, where the possible change in law would provide "no remedy at all" to plaintiff, a court may conclude that no adequate alternative exists. As the *Piper* Court observed, it did not hold that:

> [T]he possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Piper at 254, 102 S.Ct. at 265 (emphasis in original) (footnote omitted). Thus, while it is not a "major factor" in the analysis , a court must at least consider the effect on plaintiffs of a change in law upon transfer.

To a great extent, the plaintiffs in this case argue that Indian courts do not offer an adequate forum for this litigation by virtue of the relative "procedural and discovery deficiencies [which] would thwart the victims' quest for" justice. (Memorandum in Opposition by Plaintiffs' Executive Committee ("Memo in Opp.") at 2). The defendant disputes this contention.

Plaintiffs' preliminary concern, regarding defendant's amenability to process in the alternative forum, is more than sufficiently met in the instant case. Union Carbide has unequivocally acknowledged that it is subject to the jurisdiction of the courts of India, (Defendant's Memorandum in Reply filed December 20, 1985 ("Reply Memo") at 8); (oral argument January 3, 1986, transcript at 29, comment of Bud Holman, counsel for Union Carbide). Union Carbide is definitely amenable to process in India.

Beyond this initial test, plaintiffs and *amicus curiae*[4] argue that the Indian legal system is inadequate to handle the Bhopal litigation. In support of this positon, plaintiffs have submitted the affidavit of Professor Marc S. Galanter of the University of Wisconsin Law School. Professor Galanter's credentials are impressive; he was a Fulbright Scholar at the Faculty of Law of Delhi University and specializes in South Asian Studies at the University of Wisconsin Law School. He is

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[4]Rob Hager, Esq. for Citizens Commission on Bhopal, National Council of Churches, United Church of Christ Commission for Racial Justice, *et al.*

not, however, admitted to practice in India and Court views his opinions concerning the Indian legal system, its judiciary and bar as far less persuasive than those of N.A. Palkhivala and J.B. Dadachanji, each of whom has been admitted to practice in India for over 40 years. Both are Senior Advocates before the Supreme Court of India. Mr. Palkhivala served as Indian Ambassador to the United States from 1977 to 1979, and has represented the Indian government on three occasions before international tribunals.

Although the outcome of this analysis, given the rule of *Piper* regarding change in law, seems self-evident, the Court will review plaintiffs' argument on the inadequacy of the Indian forum out of deference to the plaintiffs.

A. Innovation in the Indian Judicial System.

Professor Galanter describes the Indian common law legal system, inherited from the British, in terms of its similarity to that of other common law systems. He compares the system favorably to that of the United States or Great Britain in terms of the appellate structure, the rule of *stare decisis,* the role of the judiciary as "guardian of [India's] democratic structure and protector of citizens' rights." (Galanter Aff. at 6–12) before pointing to its ostensible deficiencies. According to Professor Galanter, India's legal system "was imposed on it" during the period of colonial rule. (Galanter Aff. at 11). Galanter argues that "Indian legal institutions still reflect their colonial origins," (Galanter Aff. at 12), in terms of the lack of broadbased legislative activity, inaccessibility of legal information and legal services, burdensome court filing fees and limited innovativeness with reference to legal practice and education. (Galanter Aff. at 12).

On the question of innovativeness, Mr. Palkhivala responds with numerous examples of novel treatment of complex legal issues by the Indian Judiciary.[5] In the words of the former ambassador of India to the United States, "a legal system is not a structure of fossils but is a living organism which grows through the judicial process and statutory

[5]For example, Mr. Palkhivala describes four cases in which the Indian Supreme Court crafted new and "courageous" remedies in situations relating to abridgements of fundamental rights. (Palkhivala Aff. at 6–7). Mr. Dadachanji describes similar decisions in which he participated as an advocate, in his affidavit. (Dadachanji Aff. at 2–3). The Court recognizes the innovativeness of the Indian Courts, while refraining from an exhaustive survey of Indian case law.

enactments." (Palkhiavala Aff. at 3). The examples cited by defendant's experts suggest a developed and independent judiciary. Plaintiffs present no evidence to bolster their contention that the Indian legal system has not sufficiently emerged from its colonial heritage to display the innovativeness which the Bhopal litigation would demand. Their claim in this regard is not compelling.

B. Endemic Delays in the Indian Legal System.

Galanter discusses the problems of delay and backlog in Indian courts. Indeed, it appears that India has approximately one-tenth the number of judges, per citizen, as the United States,[6] and that postponements and high caseloads are widespread. Galanter urges that the backlog is a result of Indian procedural law, which allows for adjournments in mid-hearing, and for multiple interlocutory and final appeals. Numerous appeals and "[c]onsiderable delay [are] caused by the tendency of courts to avoid the decision of all the matters in issue in a suit, on the ground that the suit could be disposed of on a preliminary point." (Galanter Aff. at 17; 18–20, 21, quoting Indian Law Commission, 54th Report (1973) pp. 12–13).

This Court acknowledges that delays and backlog exist in Indian courts, but United States courts are subject to delays and backlog, too. *See* Remarks of Honorable Warren E. Burger, Chief Justice, Supreme Court of the United States, 100 F.R.D. 499, 534 (1983).

However, as Mr. Palkhivala states, while delays in the Indian legal system are a fact of judical life in the proposed alternative forum, there is no reason to assume that the Bhopal litigation will be treated in ordinary fashion.

The Bhopal tragedy has already been approache ' with imagination in India. Demonstrating the creativity and flexibility of the Indian system, the Parliament of India has passed the Bhopal Act in order to deal with the cases arising from the sad events of December 3, 1984. The Bhopal Act permits the cases to be treated "speedily, effectively, equitably and to the best advantage of the claimants." (Palkhivala Aff. at 11).

Mr. Dadachanji refers to another Indian case which arose from a gas leak in New Delhi. The Chief Justice and another Justice of the Supreme Court of India ordered the presiding court to expedite adjudi-

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[6] India allegedly has 10.5 judges per million population, as compared to 107 judges per million in the United States (Galanter Aff. at 15).

cation of claims. *M.C. Mehta v. Union of India.* (Dadachanji Aff. at 11 and Annexure A thereto). In another instance, the Indian Supreme Court directed the High Court to hear a given matter on a daily basis, and set a deadline for delivering judgment, (Dadachanji Aff. at 11 and Annexure B thereto). Other means of coping with delay are appointment of special tribunals by the Government of India (Dadachanji Aff. at 12 and Annexure C thereto), and assignment of daily hearing duties to a single special judge, otherwise unburdened, to hear a special matter. (Dadachanji Aff. at 11). This Court is persuaded, by the example of the Bhopal Act itself and other cases where special measures to expedite were taken by the Indian judiciary, that the most significant, urgent and extensive litigation ever to arise from a single event could be handled through special judicial accommodation in India, if required.

C. Procedural and Practical Capacity of Indian Courts.

Plaintiffs contend that the Indian legal system lacks the wherewithal to allow it "to deal effectively and expeditiously" with the issues raised in this lawsuit. (Memo in Opp. at p. 53).

Plaintiffs urge that Indian practitioners emphasize oral skills rather than written briefs. They allegedly lack specialization, practical investigative techniques and coordination into partnerships. These factors, it is argued, limit the Indian bar's ability to handle the Bhopal litigation. As Mr. Dadachanji indicates, Indian lawyers have competently dealt with complex technology transfers, suggesting capability within the technological and scientific areas of legal practice, if not "specialization." (Dadachanji Aff. at 8). Moreover, Indian attorneys use experts, when necessary. As to investigative ability, Mr. Dadachanji persuasively points out that the Central Bureau of Investigation ("CBI") of the Union of India is well equipped to handle factual inquiry, as is the Commission of Enquiry constituted by the state of Madhya Pradesh. (Dadachanji Aff. at 8). While Indian attorneys may not customarily join into large law firms, and as Mr. Palkhivala states, are limited by present Indian law to partnerships of no more than twenty, this alone or even in concert with other factors does not establish the inadequacy of the Indian legal system. (Palkhivala Aff. at 8). There is no reason the Indian legislature could not provide for the expansion of law firms, if such a choice is required. In any event, this Court is not convinced that the size of a law firm has that much to do with the quality of legal service

provided. Many small firms in this country perform work at least on a par with the largest firms. Bigger is not necessarily better.

Moreover, since the Union of India purports to represent all the claimants, it is likely that if the case were transferred to India, the Attorney General or Solicitor General of India and the Advocate General of Madhya Pradesh, with attendant staffs, would represent the claimants. The Indian bar appears more than capable of shouldering the litigation if it should be transferred to India. (Palkhivala Aff. at 9).

Next, plaintiffs and Professor Galanter argue that the substantive tort law of India is not sufficiently developed to accommodate the Bhopal claims. Plaintiffs trace the lack of sophistication in Indian tort law to the presence of court fees for litigants as inhibiting the filing of civil suits. Though the filing fees may have had historical significance, they are irrelevant here. Professor Galanter acknowledges that court fees may be waived for "poor parties or for specific classes of litigants." (Galanter Aff. at 28). In fact, filing fees have been waived for claimants in India in the Bhopal litigation already begun there.

Professor Galanter asserts that India lacks codified tort law, has little reported case law in the tort field to serve as precedent, and has no tort law relating to disputes arising out of complex product or design liability. (Galanter Aff. at 30–36). As an illustration of the paucity of Indian tort law, Professor Galanter states that a search through the *All-India Reports* for the span from 1914 to 1965 revealed only 613 tort cases reported. (Galanter Aff. at 32). Mr. Dadachanji responds that tort law is sparsley reported in India due to frequent settlement of such cases, lack of appeal to higher courts, and the publication of tort cases in specialized journals other than the *All-India Reports*. (Dadachanji Aff. at 16–17; Palkhivala Aff. at 10). In addition, tort law has been codified in numerous Indian statutes. (Dadachanji Aff. at 16–17).

As Professor Galanter himself states, "the major categories of tort, their elements, the [theories] of liability, defenses, *respondeat superior*, the theories of damages—are all familiar." (Galanter Aff. at 37). What is different, Galanter asserts, is the complete absence of tort law realting to high technology or complex manufacturing processes. This is of no moment with respect to the adequacy of the Indian courts. With the groundwork of tort doctrine adopted from the common law and the precedential weight awarded British cases, as well as Indian ones, it is obvious that a well-developed base of tort doctrine exists to provide a guide to Indian courts presiding over the Bhopal litigation. In any

event, much tort law applied in American cases involving complex technology has its source in legal principles first enunciated in Victorian England. *See, e.g., Rylands v. Fletcher,* 1868, L.R. 3 H.L. 330. As Mr. Palkhivala stated in his affidavit:

> The plant itself was the product of highly complex technology, but complexity of the technology cannot be equated with complexity of legal issues. The principles of liability and damages involved in the Bhopal cases are all well established in India. The complexity is not in the nature or determination of legal issues but in the application of the law to the events which took place in Bhopal. Well settled law is to be applied to an unusual occurrence.

(Palkhivala Aff. at 7).

Plaintiffs next assert that India lacks certain procedural devices which are essential to the adjudication of complex cases, the absence of which prevent India from providing an adequate alternative forum. They urge that Indian pre-trial discovery is inadequate and that therefore India is an inadequate alternative forum. Professor Galanter states that the only forms of discovery available in India are written interrogatories, inspection of documents, and requests for admissions. Parties alone are subject to discovery. Third-party witnesses need not submit to discovery. Discovery may be directed to admissible evidence only, not material likely to lead to relevant or admissible material, as in the courts of the United States. Parties are not compelled to provide what will be actual proof at trial as part of discovery.

These limits on discovery are adopted from the British system. Similar discovery tools are used in Great Britain today. This Court finds that their application would perhaps, however, limit the victims' access to sources of proof. Therefore, pursuant to its equitable powers, the Court directs that the defendant consent to submit to the broad discovery afforded by the United States Federal Rules of Civil Procedure if or when an Indian court sits in judgment or presides over pre-trial proceedings in the Bhopal litigation.[7] Any dismissal of the action now before this Court is thus conditioned on defendant's consent to submit to

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[7] A federal court has the power to condition transfer under the doctrine of *forum non conveniens* upon "the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims." *Piper* at 257, n. 25, 102 S.Ct. 267, n. 25. While the Court feels that it would be fair to bind the plaintiffs to American discovery rules, too, it has no authority to do so.

discovery on the American model, even after transfer to another jurisdiction.

The ostensible lack of devices for third-party impleader or for organizing complex cases under the law of the state of Madhya Pradesh are two other procedural deficiencies which plaintiffs assert preclude a finding that India offers an adequate alternative forum. Assuming for the moment that, upon appropriate transfer, the Bhopal litigation would be adjudicated by the local district court in Bhopal, and that the law of Madhya Pradesh would be applied, this Court is still not moved by plaintiff's argument regarding impleader or complex litigation.

Although no specific provision in the Indian Code of Civil Procedure permits the impleading of third-parties from whom contribution is sought, other provisions in the Code do provide for impleader. As both parties to this motion state, Order 1, Rule 10(2) of the Indian Code of Civil Procedure "allows the court to add additional parties if the presence of those parties is 'necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit." (Galanter Aff. at 60; Dadachanji Aff. at 18). Professor Galanter posits that a joint tortfeasor would not be considered a necessary party, and would not be joined. Defendant's expert, conversely, asserts that a party can be added to prevent multiplicity of suits and conflicts of decisions. Thus, Mr. Dadachanji argues, defendants would be able to seek contribution from third-parties if joinder would prevent repetitive litigation or inconsistency. Moreover, the broad provision of inherent powers to aid the ends of justice, as codified at Section 151 of the Indian Code of Civil Procedure would prevent an ultimate miscarriage of justice in the area of impleader. (Dadachanji Aff. at 19).[8]

The absence of procedures of mechanisms within the Indian judiciary to handle complex litigation is presented as support for plaintiffs' position regarding the nonexistence of an adequate alternative forum. Professor Galanter asserts, for example, that Indian judges do not promote settlements. The point is wholly irrelevant to the question of

[8]The Court observes that the alleged problem would appear to act to the detriment of defendant, not plaintiffs. It is Union Carbide which urges that third-party defendants are necessary. (Memo in Support at 27–28). Defendant discounts the supposed unavailability of third-party impleader, while the plaintiffs find its lack objectionable. These postures lead the Court to the conclusion that this argument is not compelling in either direction. The lack of specific third-party practice will not concern the Court if it does not concern Union Carbide.

whether an adequte alternative forum exists. In any event, this Court has labored hard and long to promote settlement between the parties for over a year, to no avail. It would appear that settlement, although desirable for many reasons, including conservation of attorney's fees and costs of litigation, preservation of judicial resources, and speed of resolution, is unlikely regardless of the level of activism of the presiding judge.

Plaintiffs' next contention is that since no class action procedure exists in India expeditious litigation of the Bhopal suits would be impossible. As with all of plaintiffs' other arguments, this purported deficiency does not constitute "no remedy" at all. Professor Galanter himself acknowledges that Order 1, Rule 8 of the Indian Code of Civil Procedure provides a mechanism for "representative" suits, "where there are numerous persons having the same interest in one suit." (Galanter Aff. at 54). Even if the current state of Indian law regarding "representive" suits involves application of the mechanism to pre-existing groups such as religious sects or associations, there is no reason to conclude that the Indian legislature, capable of enacting the Bhopal Act, would not see its way to enacting a specific law for class actions. In addition, it does not appear on the face of Order 1, Rule 8 that the "representative" suit is expressly limited to pre-existing groups. The Indian district court could adopt the rule for use in a newly created class of injured, whose members all have "the same interest" in establishing the liability of the defendant. An Indian court has law available to create a representative class, or perhaps a few different representative classes. The "scheme" for registration and processing of claims, *see supra,* at 4, could perform the task of evaluating the specific amounts of claims. Moreover, Mr. Dadachanji gives at least three examples where Indian courts have consolidated suits pursuant to their inherent power under Section 151 of the Indian Code of Civil Procedure. In at least one case, such consolidation allegedly occurred without consent of the parties. (Dadachanji Aff. at 9). The absence of a rule for class actions which is identical to the American rule does not lead to the conclusion that India is not an adequate alternative forum.

Final points regarding the asserted inadequacies of Indian procedure involve unavailability of juries or contigent fee arrangements in India. Plaintiffs do not press these arguments, but Mr. Palkhivala touches upon them. They are easily disposed of. The absence of juries in civil cases is a feature of many civil law jurisdictions, and of the United

Kingdom. *Piper* at 252, n. 18, 102 S.Ct. at 264, n. 18 and citations therein. Futhermore, contingency fees are not found in most foreign jurisdictions. *Piper* at 252, n. 18, 102 S.Ct. at 264, n. 18. In any event, the lack of contingency fees is not an insurmountable barrier to filing claims in India, as demonstrated by the fact that more than 4,000 suits have been filed by victims of the Bhopal gas leak in India, already. According to Mr. Palkhivala, moreover, well-known lawyers have been known to serve clients without charging any fees. (Palkhivala Aff. at 8).

Plaintiffs' final contention as to the inadequacy of the Indian forum is that a judgment rendered by an Indian court cannot be enforced in the United States without resort to futher extensive litigation. Conversely, plaintiffs assert, Indian law provides *res judicata* effect to foreign judgments, and precludes plaintiffs from bringing a suit on the same cause of action in India. (Galanter Aff. at 63–65). Mr. Dadachanji disputes this description of the Indian law of *res judicata*. He asserts that the pendency, or even final disposition, of an action in a foreign court does not prevent plaintiffs from suing in India upon the original cause of action. Plaintiffs would not be limited, Mr. Dadachanji argues, to an Indian action to enforce the foreign judgment. (Dadachanji Aff. at 19–20). In addition, he states that an Indian court, before ordering that a foreign judgment be give effect, would seek to establish whether the foreign court had failed to apply Indian law, or misapplied Indian law. (Dadachanji Aff. at 20).

The possibility of non-enforcement of a foreign judgment by courts of either country leads this Court to conclude that the issue must be addressed at this time. Since it is defendant Union Carbide which, perhaps ironically, argues for the sophistication of the Indian legal system in seeking a dismissal on grounds of *forum non conveniens*, and plaintiffs, including the Indian Government, which state a strong preference for the American legal system, it would appear that both parties have indicated a willingness to abide by a judgment of the foreign nation whose forum each seeks to visit. Thus, this Court conditions the grant of a dismissal on *forum non conveniens* grounds on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India. Absent such consent to abide by and to "make good" on a foreign judgment, without challenge except for concerns relating to minimal due process, the motion to dismiss now under consideration will not be granted. The preference of both parties to play ball on a distant field will be taken to its limit, with

each party being ordered to be bound by the decision of the respective foreign referees.

To sum up the discussion to this point, the Court determines that the Indian legal system provides an adequate alternative forum for the Bhopal litigation. Far from exhibiting a tendency to be so "inadequate or unsatisfactory" as to provide "no remedy at all," the courts of India appear to be well up to the task of handling this case. Any unfavorable change in law for plaintiffs which might be suffered upon transfer to the Indian courts, will, by the rule of *Piper*, not be give "substantial weight." Differences between the two legal systems, even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum. As Mr. Palkhivala asserts with some dignity, "[w]hile it is true to say that the Indian system today is different in some respects from the American system, it is wholly untrue to say that it is deficient or inadequate. Difference is not to be equated with deficiency." (Palkhivala Aff. at 4). *Piper* at 254, 102 S.Ct. at 265. The inquiry now turns to a weighing of the public and private interest factors.

2. Private Interest Concerns.

The *Gilbert* Court set forth a list of considerations which affect the interest of the specific litigants to an action, and which should be weighed in making a *forum non conveniens* determination. The so-called private interest factors, along with public interest factors discussed below, were not intended to be rigidly applied. As the Court stated in *Piper*,

> "[E]ach case turns on its facts." If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the flexibility that makes it so valuable.

Piper at 249–50, 102 S.Ct. at 263. Recognizing that "[p]articularly with respect to the question of relative ease of access to sources of proof," "the private interests point in both directions," the Supreme Court nevertheless upheld a district court's decision to dismiss a case in favor of the relative convenience of a forum in Scotland. *Piper* at 257, 102 S.Ct. at 267. By contrast, this Court finds that the private interests point strongly one way. As in *Piper*, it appears that the burdensome effect of a trial in this forum supports a finding that the private interest factors in this case weigh strongly in favor of dismissal.

A. Sources of Proof.

The first example of a private interest consideration discussed in *Gilbert* is "relative ease of access to sources of proof." As stated, the analysis of this issue must hinge on the facts. Limited discovery on the issue of *forum non conveniens* has taken place, pursuant to the Court's order of August, 14, 1985.[9] The Court can therefore proceed to discuss this question.

Union Carbide argues that virtually all of the evidence which will be relevant at a trial in this case is located in India. Union Carbide's position is that almost all records relating to liability, and without exception, all records relevant to damages, are to be found in and around Bhopal. On the liability question Union Carbide asserts that the Bhopal plant was managed and operated entirely by Indian nationals, who were employed by UCIL. (Affidavit of Warren J. Woomer, formerly Works Manager of the Bhopal plant ("Woomer Aff.") at 2). Defendant asserts that the Bhopal plant is part of UCIL's Agricultural Products Division, which has been a separate division of UCIL for at least 15 years, and that the plant had "limited contact" with UCIL's Bombay headquarters, and almost no contact with the United States. (Woomer Aff. at 4, 32). Woomer claims to have been the last American employed by UCIL. He departed from Bhopal in 1982. (Woomer Aff. at 2).

Woomer describes the structure and organization of the Bhopal facility at the time of the accident. The plant had seven operating units, each headed by a manager or department head, each an Indian national.[10] The managers or department heads each reported directly to the plant's General Works Manager, or to one of three Assistant Works Managers. (Woomer Aff. at 6). Each of these is also an Indian national. Three of the operating units which at this very early stage of inquiry into liability appear to have been potentially involved in the MIC leak are the Carbon Monoxide, MIC/Phosgene and Carbamoylation units. (Woomer Aff. at 7–10). The Carbon Monoxide and MIC/Phosgene units together employed 63 employees, all Indian nationals. (Woomer

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[9]Discovery was ably managed by Magistrate Michael H. Dolinger, of the Southern District of New York.

[10]The seven operating units included Carbon Monoxide, MIC/Phosgene, Carbamoylation, Alpha Naphthol, Aldicarb, Utilities and Formulations.

Aff. at 9). The Carbamoylation unit employed 99 Indian nationals. (Woomer Aff. at 10). Mr. Woomer states that an inquiry into the cause of the accident would require interviews with at least those employees who were on duty at the Bhopal facility "immediately prior or after the accident;" Mr. Woomer asserts that there are 193 employees, all Indians, who must be interviewed. (Woomer Aff. at 58).[11]

In addition to the seven operating units, the Bhopal plant contained seven functional departments which serviced operations.[12] The seven heads of the units reported within the plant much as the department heads did.

The maintenance unit was apparently subdivided into departments including Instrumentaion, Mechanical Maintenance, both part of the Agricultural Chemical Maintenance unit, which employed 171 people in total, and Plant Engineering and Formulation Maintenance, which employed 46 people. (Woomer Aff. at 11–12). In addition, the Utilities and Electrial department employed 195 people. (Woomer Aff. at 13). According to Mr. Woomer, the various maintenance organizations performed repairs on equipment, provided engineering support, fabricated certain equipment, salvaged other portions, and controlled utilities, temperatures and pressures throughout the plant. (Woomer Aff. at 11–14).

Moreover, according to Mr. Woomer, these UCIL departments also kept daily, weekly and monthly records of plant operations, many of which were purportedly seized by the CBI and selected for copying by CBI immediately after the accident.[13] The records and reports of the various maintenance units would likely be relevant to the question of liability at trial.

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[11] Mr. Woomer states that a post-accident technical team sought to interview these 193 employees. According to Mr. Woomer, the Indian CBI, which had stepped into the plant following the tragedy, advised the technical team that interviews could be conducted only of the General Works Manager and MIC Production Manager, neither of whom was present at the time of the leak. (Woomer Aff. at 57–58).

[12] The seven functional units were Maintenance, Quality Control, Stores, Purchasing, Safety/Medical, Industrial Relations and Works Office. (Woomer Aff. at 6).

[13] Mr. Bud Holman, counsel for Union Carbide, states in his second affidavit that over 36,000 of the 78,000 pages of documents seized by the CBI represent plant operation records. (Holman Aff. #2 at 5). He asserts that 1,700 pages deal with maintenance work performed in 1983 and 1984. (Holman Aff. #2 at 8).

Of the additional functional units, it is possible that Quality Control, with 54 employees, Purchasing, with 53, or Stores may have been directly involved in the disaster by virtue of their participation in analyzing plant output, procuring raw materials for the chemical processes of the plant, and maintaining spare parts and certain chemicals. (Woomer Aff. at 14–19). Thus, the records and reports of these three departments may be necessary to an investigation of liability. While examination of members of the Works Office department and Industrial Relations department would likely be less directly useful, information regarding plant budgets and employee histories might be of relevance. Of great importance are the records and reports of the Safety/Medical department, which was responsible for daily auditing of safety performance in all departments, training and testing on safety rules, maintaining safety statistics and planning and implementing safety drills. (Woomer Aff. at 22–23). The 31 Indian employees of this department worked with the Central Safety Committee of the plant, whose members were drawn from plant management, and the Departmental Safety Committees. Operating units were required to monitor plant safety mechanisms weekly, and to keep monthly checklists. (Holman Aff. #2 at 9). The Central Safety Committee met monthly, as did the Departmental Safety Committees. (Woomer Aff. at 39). The MIC Unit held monthly safety commitee meetings, for example, and issued monthly reports. (Woomer Aff. at 41). Quarterly "Measures of Performance" reviews also covered safety issues, and were required of each operating unit. (Woomer Aff. at 40). Certainly, interviews of the plant personnel involved in safety reports and audits would be particularly relevant to the investigation of the disaster.

Plaintiffs refer to three occasions upon which Union Carbide, not UCIL, employees conducted safety audits at the Bhopal plant. As defendant correctly argues, these three events constitute a very small fraction of the thousands of safety audits conducted at the Bhopal facility. The three audits, moreover, were conducted in 1979, the fall of 1980, and in May of 1982, many years prior to the accident which is the

subject of this lawsuit. (Plaintiffs' Memo in Opp. at 25).[14]

Two accidents which occurred previously at the Bhopal plant might also be of relevance to the liability inquiry in this litigation. On December 24, 1981, a phosgene gas leak killed a UCIL maintenance worker. Reports of the fatality were sent to Union Carbide management in the United States. (Woomer Depostion, Exs. 30 and 31). Plaintiffs assert that the accident report called for increased training in Bhopal by United States employees of Union Carbide's Institute, West Virginia, plant. Defendant states that the responsibility for remedying problems in the Bhopal plant rested with the plant itself, and the Union Carbide did not make any recommendations, and was involved only to the extent of receiving a copy of the report which called for its involvement in further training. (Woomer Aff. at 41).

The second accident at Bhopal prior to the disaster of December, 1984 took place on February 9, 1982, when a pump seal, perhaps improperly used, failed. (Memo in Opp. at 24; Woomer Aff. at 41). Many employees were injured, and at least 25 were hospitalized. Plaintiffs discuss the fact that Robert Oldford, president of Union Carbide Agricultural Products Company ("UCAPC") a wholly-owned subsidiary of Union Carbide headquartered in the United States, was in Bhopal at the time of the February, 1982 leak. (Memo Opp. at 24). Union Carbide asserts that Mr. Oldford was visiting UCIL's Research and Development Centre, located several miles from the Bhopal plant for an unrelated purpose, and was only coincidentally in Bhopal when the leak occurred. To the extent that his presence in India in 1982 has any significance, Mr. Oldford, and any other United States employees of Union Carbide who conducted safety audits in Bhopal or were present when accidents occurred there, may be flown to Bhopal for testimony or discovery.

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[14]The 1982 "Operational Safety Survey" was apparently fairly extensive. It was conducted by three United States employees of Union Carbide, and led to a report which discussed "major" concerns and possibility of "serious personnel exposure." (Memo in Opp. at 25). Mr. Woomer asserts, and plaintiffs do not refute, that this Survey was not intended to "serve a policing function," but was performed at the specific request of UCIL. In addition, follow-up responsibility "rested exclusively with UCIL plant management." (Woomer Aff. at 37–38).

Moreover, Union Carbide states that the Union of India, itself, conducted similar safety audits and made recommendations. (Affidavit of Ranjit K. Dutta, Business Manager of Union Carbide Agricultural Products Company ("Dutta Aff.") at 58–64).

In addition to safety data, two other types of proof may be relevant to a trial of this case on the merits. Information regarding plant design, commissioning and start-up my bear upon the liability question. Information pertinent to employee training should also have significance.

Leaving aside the question of whether the Government of India or UCIL chose the site and product of the Bhopal plant, the Court will evaluate the facts which bear on the issue of relevant records. The findings below concern the location of proof only, and bear solely upon the *forum non conveniens* motion. The Court expressly declines to make findings as to actual liability at this stage of the litigation.

Plaintiffs and defendant agree that in 1973 Union Carbide entered into two agreements with UCIL which were entitled "Design Transfer Agreement" and "Technical Service Agreement." According to plaintiffs, Union Carbide, pursuant to the Design Transfer Agreement, provided a process design to UCIL, the "detailing [of which] was undertaken in India." (Memo in Opp. at 17). The process design package consisted of the basic plan of the factory, which was to be fleshed out in the detailing phase. Plaintiffs state that at least nine Union Carbide technicians travelled to India to monitor the progress of the project. Union Carbide also allegedly assigned a "key engineer," John Couvaras, to serve as UCIL Bhopal project manager. Mr. Couvaras allegely "assumed responsibility for virtually every aspect of the detailing of the process design," and approved detail reports of "not only UCIL but also independent contractors, including Humphreys and Glasgow Consultants Private Ltd. and Power Gas Limited" of Bombay, India. (Memo in Opp. at 17–20).[15]

Plaintiffs also claim that "[n]o change of any substance was made from Union Carbide's design during the detailing phase." Plaintiffs note that only "one portion" of the process design work provided to UCIL by Union Carbide was not used. (Memo in Opp. at 20). In effect, plaintiffs seek to establish that Union Carbide was the creator of the design used in the Bhopal plant, and directed UCIL's relatively minor detailing program. They urge that for the most part relevant proof on this point is located in the United States.

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[15]Plaintiffs assert that Mr. Couvaras exemplifies Union Carbide's "international employee" whose mobility throughout the Union Carbide affiliates causes "[a]ny notion of discrete corporate identities [to] blur[ ]." (Memo in Opp. at 18–19).

Defendant seeks to refute this contention, with notable success. Turning first to the affidavit of Robert C. Brown, who describes himself as "chief negotiator for Union Carbide Corporation in connection with the two agreements it entered into with... UCIL in November, 1973," the Court is struck by the assertion that the two agreements were negotiated at "arms-length" purusant to Union Carbide corporate policy, and that the Union of India mandated that the Government retain "specific control over the terms of any agreements UCIL made with foreign companies such as Union Carbide Corporation." (Brown Aff. at 3–4).[16]

Mr. Brown alleges that the Letter of Intent issued by the Union of India in March 1972, pursuant to which construction and design of the plant were allowed to ensue provided, *inter alia*, that:

> (2) [F]oreign collaboration and import of equipment be settled to the satisfaction of the Government.

Mr. Brown claims, on personal information, that UCIL told him that Union Carbide would not be allowed to be involved in the Bhopal project beyond the provision of process design packages. (Brown Aff. at 5). The Design Transfer Agreement indicates that Union Carbide's duty under the Agreement was to provide process design packages, and that UCIL, not Union Carbide, would be responsible to "detail design, erect and commission the plant." (Defendant's Ex. 4, § 4.1). Union Carbide, accordingly, issued limiting warranties with respect to the design packages, detailing of which it would not be involved with. (Brown Aff. at 7, Ex. 4, §§ 4.1, 12.3).

The nature of UCIL's detail design work is discussed in the affidavit of Ranjit K. Dutta, who has held various positions at UCIL and UCAPC. From 1973 through 1976, Mr. Dutta was employed as General Manager of the Agricultural Products Division of UCIL. (Dutta Aff. at 2).

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[16] As support, Mr. Brown points to the Union Carbide Corporate Policy Manual, Section 1.10 which states:

> The "arms-length principle" is a central consideration in transfer and pricing of all technology transactions with affiliates.

"Arms length" is defined as:

> The principle whereby inter-company transactions between Union Carbide and its affiliates, or between affiliates, will reflect the cost to unrelated parties of the same or similar technology under similar circumstances.

(Plaintiffs' Exhibit 3). Thus, Mr. Brown argues that Union Carbide related with UCIL much as it would have with an unaffiliated, or even competing company.

Mr. Dutta asserts that the Bhopal facility was built by UCIL over the eight years from 1972 to 1980. (Dutta Aff. at 8). He asserts that Union Carbide's role in the project was "narrow", and limited to providing "certain process design packages for certain parts of the plant." (Dutta Aff. at 9). He continues, stating:

Once it did that, it had no further design or engineering role,

and that:

> [T]he process design packages which Union Carbide Corporation provided are nothing more than summary design starting points.... They set forth only the general parameters.... A plant cannot be constructed from a process design package. The detail design comprises approximately 80 percent of the sum of the man hours involved in the design of any project and transposes the general process design parameters into an actual design which can be used for purchasing equipment and actual construction.

(Dutta Aff. at 9–12). (emphasis omited).

According to Mr. Dutta, during the five years between the date upon which Union Carbide submitted process designs, and the date upon which the plant started up, there were only four visits to Bhopal by Union Carbide process design engineers. (Dutta Aff. at 14). In contrast, he asserts that ten to fifteen UCIL engineers, working primarily out of Bombay, were involved in design detailing. (Dutta Aff. at 16). These UCIL engineers oversaw the 55 to 60 Indian engineers employed by the Bombay engineering firm which performed the detail design work. This firm, Humphreys and Glasgow, submitted designs and drawings to the UCIL engineers for approval. Corrected drawings were returned by UCIL to Humphreys and Glasgow for changes, and sent back to UCIL

for final approval. (Dutta Aff. at 19–24).[17] Mr. Dutta alleges that "at no time were Union Carbide Corporation engineering personnel from the United States involved in approving the detail design or drawings prepared upon which construction was based. Nor did they receive notices of changes made." (Dutta Aff. at 24).

Mr. Dutta expressly states that the MIC storage tank and monitoring instrumentation were fabricated or supplied by two named Indian subcontractors. The vent gas scrubber is alleged to have been fabricated in the Bhopal plant shop. (Dutta Aff. at 25).

Of the 12,000 pages of documents purportedly seized by the CBI regarding design and construction of the Bhopal plant, an asserted 2,000 are design reports of Humphreys and Glasgow, UCIL or other contractors. Defendant claims that blueprints and calculations comprise another 1,700 pages of documents held by the CBI. Five thousand pages of contractors' files, including specfications and contracts are asserted to be in India. In addition, Union Carbide claims that blueprints and diagrams may not reflect final design changes as incorporated into the actual plant, and that the detail design engineers' testim-

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[17]Humphreys and Glasgow was allegedly responsible for the following:

> Among other things, developing final equipment and unit layouts and plot plans, including equipment layout drawings, detailed piping arrangement drawings, layout of electrial equipment; the steel structure, including detail design and working drawings for the buildings and foundation; mechanical equipment design including specification of all proprietary and fabricated equipment; review and certification of vendor's drawings and documents, preparation of orthographic piping drawings for all portions of the plant, preparation of isometric piping drawings, preparation of preliminary and final bills of materials for pipes, valves, gaskets, instrument associated hardware, electrical conduit; electrical engineering work, instrument engineering, including drawings on instrument hook ups, lists of instruments, review of instrument specification and data sheets; definition of material and make calculation to size insulation, preparation of insulation lists, preparation of material take off and inquiry specification packages, procurement assistance including assisting in evaluation of bids and selection of vendors, inspection of certain equipment and materials to ensure proper workmanship and compliance with specifications and codes, and coordinating where Indian law required inspection or certification by governmental inspections; preparation of a project schedule, project reports and costs control reports at least once per month, construction supervision including supervision of mechnical testing of installed equipment, assistance in commissioning.

(Dutta Aff. at 19–20).

ony will be needed to determine the configuration of the actual plant.[18] (Holman Aff. #2 at 15–16).

One final point bearing on the information regarding liability is contained in the affidavit of Edward Munoz, at a relevant time the General Manager of UCIL's Agricultural Products Division. He later acted as Managing Director of UCIL. Mr. Munoz has submitted an affidavit in which he states that Union Carbide decided to store MIC in large quantities at the Bhopal plant, despite Mr. Munoz' warnings that MIC should be stored only in small amounts because of safety. (Memo in Opp. at 15–16; Munoz Aff.). Mr. Dutta, for defendant, asserts that there was never any issue of token storage of MIC at Bhopal, as Mr. Munoz states, and that there is no truth to Mr. Munoz' assertion that he was involved in the storage issue. (Dutta Aff. at 30).[19] The Court cannot make any determination as to the conflicting affidavits before it. This question, which involves credibility concerns, is left for later in the litigation. To the extent that this particular matter bears upon the relative ease of access to sources of proof, Mr. Munoz and Mr. Dutta both may be called to testify at trial or discovery. Mr. Dutta's home is in Bhopal. (Dutta Aff. at 1). The Court is not aware of the whereabouts of Mr. Munoz at this time. Either of the two could travel to either alternative forum.

In addition to design and safety records, material regarding training of Bhopal personnel is likely to be relevant to the question of liability. Plaintiffs state that Warren Woomer supervised the training of UCIL personnel at Union Carbide's Institute, West Virginia plant. According to plaintiffs, 40 UCIL employees were transported to Institute's MIC facility for lengthy training. (Memo in Opp. at 22). Mr. Woomer states in reply that the 40 employees thus trained represented a fraction of the

[18]Mr. Couvaras, whom plaintiffs assert was a "key engineer" for the project, and enjoyed mobility between Union Carbide and UCIL, is described by Mr. Dutta as primarily a UCIL employee. The "international employee" status he carried is explained as a pension accounting mechanism. (Dutta Aff. at 27).

[19]Mr. Dutta asserts that Mr. Munoz was a paid consultant to a member of Plaintiffs' Executive Committee at the time the affidavit was made. No documentary proof of this assertion has been submitted. (Dutta Aff at 31; Holman Aff. #2 at 18). Moreover, two affidavits submitted on behalf of defendant state that Mr. Munoz was removed from his position as Union Carbide Corporation Division President in 1978, and is "extremely bitter as a result of the removal." (Dutta Aff. at 31; Holman Aff. #2 at 18).

over 1,000 employees who were trained exclusively in Bhopal. (Woomer Aff. at 43). In addition, Mr. Woomer asserts that the training in Institute was pursuant to an arms-length agreement, that UCIL selected the parties to be trained, and that UCIL paid Union Carbide for the training. (Woomer Aff. at 43). Moreover, Mr. Woomer's description of the training provided at Bhopal suggests that each of the plant's employees had lengthy cumulative training, of which the Institute training was but a very small portion. (Woomer Aff. at 46). Personnel records, in any event, are located in Bhopal. (Holman Aff. #2 at 4).

The briefs and affidavits contain considerable discussion on the matter of commissioning and start-up of the Bhopal plant. The Court need not resolve the question of who was responsible for these aspects of plant operation. However, the Court determines that the manual regarding start-up was prepared by Indian nationals employed by UCIL. (Woomer Aff. at 48).

In the aggregate, it appears to the Court that most of the documentary evidence concerning design, training, safety and start-up, in other words, matters bearing on liability, is to be found in India. Much of the material may be held by the Indian CBI. Material located in this country, such as process design packages and training records of the 40 UCIL employees trained at Institute, constitutes a smaller portion of the bulk of the pertinent data than that found in India. Moreover, while records in this country are in English, a language understood in the courts of India, certain of the records in India are in Hindi or other Indian languages, as well as in English. (Holman Aff. #2 at 12). The Indian language documents would have to be translated to be of use in the United States. The reverse is not true. It is evident to the Court that records concerning the design, manufacture and operation of the Bhopal plant are relatively more accessible in India than in the United States, and that fewer translation problems would face an Indian court than an American court. Since Union Carbide has been directed to submit to discovery in India pursuant to the liberal grant of the American Federal Rules of Civil procedure, and this opinion is conditioned upon such submission, any records sought by plaintiffs must be made avialable to them in India. The private interest factor of relative ease of access to sources of proof bearing on liability favors dismissal of

the consolidated cases.[20] The Indian Government is asserted to have been involved in safety, licensing and other matters relating to liability. Records relating thereto are located in India, as are the records seized by the CBI. Although plaintiffs state that all such records could and would be made available to this Court, it would be easier to review them in India. Transmittal and translation problems would thereby be avoided.

B. Access to Witnesses.

Gilbert teaches a second important consideration under the heading of private interests, the "availability of compulsory process for attendance of willing, and the cost of obtaining attendance of unwilling, witnesses." *Gilbert*, 330 U.S. at 508, 67 S.Ct. at 843. As discussed in detail above, most witnesses whose testimony would relate to questions of causation and liability are in India. Engineers from UCIL and Humphreys and Glasgow and other subcontractors, of whom there are hundreds, are located in India. Shift employees from the possibly malfunctioning units, safety monitoring personnel, those responsible for training, safety auditing, procurement, compliance with regualtions and other operations might be required to testify. More than likely, many of these potential witnesses do not speak English, and would require translators. Many of the witnesses are not parties to this litigation. Therefore, as the Court of Appeals for the Second Circuit has stated in the context of a *forum non conveniens* motion:

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[20] Union Carbide asserts throughout its briefs and affidavits that evidence relevant to the question of damages is located in India, as well. Certainly the victims themselves, and, for the most part, their medical records, are found in or near Bhopal. However, as plaintiffs argue, a "head count" of witnesses is not dispositive of a *forum non conveniens* motion. (Memo in Opp. at 74–79). Not all of the victims would need to be transported to the United States to describe their injuries. The Bhopal "scheme" provides a mechanism for evaluating each individual's claim. Only representative plaintiffs need testify as to damages. This Court would not countenance the impractical and time-consuming process of calling each of the approximately 200,000 victims at a trial in this country. Evidence on damages, as well as liabiity, is found in India, but not to the overwhelming extent contended by defendant. Moreover, the Court is concerned with the policy effect of allowing the number of foreign victims to affect directly the *forum non conveniens* determination. If carried to the extreme, this "head count" doctrine would mean that the more people hurt, the less likely a suit in this country would be.

> In fact, the plaintiffs' cases on liability will depend in large measure upon the knowledge and activities of such witnesses as the employees of [companies] who are not parties to this litigation, but who directly participated in the events which gave rise to it. The United States District Court in New York, however, has no power to subpoena any of these witnesses. It is unlikely that many would be willing to travel to New York to testify; and the cost, in any event, would be prohibitively great.

Fitzgerald v. Texaco, 521 F.2d 448, 451–52 (2d Cir.1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976) (footnote omitted). In contrast, the relatively few witnesses who reside in the United States are primarily employed by Union Carbide. As employees of a party they would probably be subject to the subpoena power of Indian courts. Transportation costs would also be lower, since fewer people would have to make the journey to testify.

The presence of the Indian Government in this action is also of critical importance on this motion. Plaintiffs assert that "all necessary officials and employees of the Central Government will voluntarily comply with requests to attend trial." (Memo in Opp. at 70; Answer to No. 124 of Defendant's First Requests for Admission, Exhibit 55. This Statement does not provide for attendance by officials of Madhya Pradesh or the Bhopal municipality, whom Union Carbide indicates might be impleaded as third-party defendants. As witnesses only, these officials would not be subject to this Court's subpoena power. As third-party defendants, they might be immune from suit in the United States by the terms of the Foreign Sovereign Immunities Act. 28 U.S.C. § 1602 *et seq.* State and city officials might also lack sufficient contacts with this district to allow this Court to exercise personal jurisdiction over them.

While Union Carbide might be deprived of testimony of witnesses or even potential third-parties if this action were to proceed in this forum, no such problem would exist if litigation went forward in India.

The unavailability of compulsory process for Indian non-party witnesses, of whom there are many, such as would ensure their presence at a trial in this country, the high cost of transporting the large number of Indian nationals to the United States, as well as the need to translate their testimony should they appear, all support the argument favoring dismissal of this action on *forum non conveniens* grounds. The private interest concerns regarding witnesses emphasize the logic of defendant's position. Relatively fewer witnesses reside in the United States than in

India. Almost all of the witnesses located in the country are employees of the defendant, and would be subject to compulsory process in India as a result. Transportation costs for the relative few would not compare to the alternate costs of transporting hundreds of Indian witnesses. Since English is widely spoken in India, less translation would be required for foreign witnesses in India than in the converse situation. Should this case be tried in India, fewer obstacles to calling state and local officials as witnesses or parties would face the defendant. The Court determined that this private interest factor weighs in favor of dismissal.

C. Possibility of View.

The third private interest factor articulated in *Gilbert* is the ease of arranging for a view of the premises around which the litigation centers. Plaintiffs assert that the notion that a jury view of the plant and environs is necessary is "simply preposterous." (Memo in Opp. at 71). Plaintiffs note that a viewing of the premises is rarely conducted in products liability cases, since videotapes, pictures, diagrams, schematics and models are more instructive than an actual view. (Memo in Opp. at 71). A viewing of the plant and hutments would probably not be of utmost importance in determining liability, and this consideration is not afforded great weight on this motion.

However, the instant case is not identical to the product design defect case cited by plaintiffs, in which a district court judge determined that "the present appearance of the defendants' facilities may or may not be relevant to production which occurred" in the period in which the allegedly violative manufacture occurred. *Hodson v. A.H. Robins Co., Inc.*, 528 F.Supp. 809, 822 (E.D.Va.1981), *aff'd*, 715 F.2d 142 (4th Cir. 1983). In the instant case, the site of the accident was sealed after the leak, and the present condition of the plant might be relevant to a finding of liability. A viewing may not be necessary, but conceivably could be called for later in the litigation. An Indian court is in a far better position than this Court to direct and supervise such a viewing should one ever be required. This consideration, though minor, also weighs in favor of dismissal.

In summary, then, the private interest factors weigh greatly in favor of dismissal on grounds of *forum non conveniens*. Since the "balance is strongly in favor of the defendant" and foreign plaintiffs' choice of a

foreign forum is given less than maximum deference, the Court determines that dismissal is favored at this point in the inquiry. *Gilbert* 330 U.S. at 508, 67 S.Ct. at 843.

3. Public Interest Concerns.

The *Gilbert* Court articulated certain factors which affected the interests of non-parties to a litigation to be considered in the context of the doctrine of *forum non conveniens*. These public interest concerns were held to be relevant to a court's determination of whether to dismiss on these grounds. The Supreme Court expressly identified a few factors:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert at 508–09, 67 S.Ct. at 843. The Court will consider these various factors in turn, as well as others discussed by the parties and *amicus curiae*.

A. Administrative Difficulties.

As is evident from the discussion thus far, the mere size of the Bhopal case, with its multitude of witnesses and documents to be transported and translated, obviously creates administrative problems.

There can be no doubt that the Bhopal litigation will take its toll on any court which sits in judgment on it. This Court sits in one of the busiest districts in the country, and finds, as a matter within its experience, that this is a "congested center" of litigation as described in *Gilbert* at 508. The burden which would be imposed should litigation continue here was aptly described by the Court of Appeals for the Second Circuit in *Schertenlieb v. Traum*, 589 F.2d 1156 (2d Cir.1978).

Reviewing a district judge's ruling for dismissal on the grounds of *forum non conveniens*, the Second Circuit observed that "were it not for the somewhat unusual fact that it is the forum resident who seeks dismissal, we would have to say very little regarding the exercise of Judge Metzner's discretion in dismissing this case." *Schertenlieb* at 1164. In affirming the ruling for dismissal, the Court of Appeals asked the rhetorical question:

> If litigation is in a clearly inconvenient forum, why should defendant and the court be burdened with its continuing there, if an alternative forum now exists so that plaintiff will not be without a remedy?

Schertenlieb at 1163.

This Court has already determined that because of the location of the preponderance of the evidence in India, and the difficulty of transporting documents and witnesses to this forum, this district is clearly an inconvenient forum for the litigation. An alternative forum is seen to exist in India. This Court feels that the answer to the *Schertenlieb* question is clear.

A district judge in this district, in *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S.D.N.Y.1972) evaluated the administrative concerns of the Southern District of New York, relevant to this Court today, a full fourteen years later. The *Domingo* court stated:

> It is scarcely necessary to dwell on the fact that this Court is the most heavily burdened Federal District Court in the country. The Civil Calendar grows more congested all the time. The priority now properly given to the dispostion of criminal cases tends to increase this congestion.
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> * * * * * *
>
> I see no reason why this Court, with its heavy burdens and responsiblities, should be burdened with cases like these which, from every point of view, should be tried in the courts of the nation where all the relevant events occurred and whose citizens are primarily involved. Certainly, this district and the Metropolitan area in which it is situated have no conceivable relation to this litigation except for the fact that the defendant happens to be doing business here.

Domingo at 816.

The defendant in this case, involved as it appears to have been in the process design phase of the plant's construction, may have a slightly less

tenuous connection to this forum than a corporation which is merely doing business here. Certain business conducted in New York, or in corporate headquarters in Danbury, Connecticut, may have been directly related to development or operation of the UCIL facility in Bhopal. However, almost "all the relevant events" leading to and following from the accident occurred in India. Indian citizens are primarily involved in the case, both as witnesses and claimants. The substantial administrative weight of this case should be centered on a court with the most significant contacts with the event. Thus, a court in Bhopal, rather than New York, should bear the load.

In addition to the burden on the court system, continuation of this litigation in this forum would tax the time and resources of citizens directly. Trial in this case will no doubt be lengthy. An assigned jury would be compelled to sit for many months of proof. Because of the large number of Indian language-speaking witnesses, the jurors would be required to endure continual translations which would double the length of trial. The burden on the jurors themselves, and on their families, employers and communities would be considerable. The need for translation would be avoided if trial were to be held in Bhopal.

Clearly, the administrative costs of this litigation are astounding and significant. Despite its deep concern for the victims of the tragedy, this Court is persuaded by a recent relevant decision of the New York State Court of Appeals. In the opinion of *Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, 478, N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied,* — U.S.—, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985), with reference to a decision discussing actions brought in New York by the Iranian Government against the Shah and his wife, the Court of Appeals stated that:

> [T]he taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter . . . is so ephemeral.

Islamic Republic at 483, 478 N.Y.S.2d 597, 467 N.E.2d 245 (citations omitted). Administrative concerns weigh against retention of this case.

B. The Interests of India and the United States.

Plaintiffs, and especially *amicus curiae* emphasize this point of argument in opposition to the motion to dismiss. Concerned with the asserted possibility of developing a "double-standard" of liability for

multinational corporations, plaintiffs urge that American courts should administer justice to the victims of the Bhopal disaster as they would to potential American victims of industrial accidents. The public interest is served, plaintiffs and *amicus* argue, when United States corporations assume responsibility for accidents occurring on foreign soil. "To abandon that responsiblity," *amicus* asserts, "would both injure our standing in the world community and betray the spirit of fairness inherent in the American character." (*Amicus* Brief at 4). The specific American interests allegedly to be served by this Court's retention of the case include the opportunity of creating precedent which will "bind all American multinationals henceforward," (*Amicus* Brief at 20); promotion of "international cooperation," (*Amicus* Brief at 22–23); avoidance of an asserted "double standard" of liability, and the prevention of "economic blackmail of hazardous industries which would extract concessions on health and evnironmental standards as the price of continuing operations in the United States." (*Amicus* Brief at 20). An additional American public interest ostensibly to be served by retention of the litigation in this forum is advanced by plaintiffs themselves. They assert that the deterrent effect of this case can be distinguished from the situation in *Piper*, where the Court rejected the argument that "American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and [its co-defendant] were tried in the United States, where they could be sued on the basis of both negligence and strict liability." *Piper* 454 U.S. at 260, 102 S.Ct. at 268. The Court stated that:

> [T]he incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

Piper at 260–61, 102 S.Ct. at 268. According to plaintiffs, the potential for greater deterrence in this case is "self-evident."

The opposing interest of India is argued to be ill-served by sending this litigation to India. Pointing to the fact that the Union of India chose this forum, plaintiffs state that there can be "no question as to the public interest of India." (Memo in Opp. at 91). Union Carbide's statements regarding the interests of India in this litigation are summarily dismissed by the plaintiffs, who state that "Union Carbide,

whose actions caused the suffering of an entire city, has no standing to assert this belated concern for the welfare of the Indian populace." (Memo in Opp. at 91).

Union Carbide, not surprisingly, argues that the public interest of the United States in this litigation is very slight, and that India's interest is great. In the main, the Court agrees with the defendant.

As noted, Robert C. Brown states in his affidavit on behalf of Union Carbide that the Indian Government preserved the right to approve foreign collaboration and import of equipment to be used in connection with the plant. *See supra* at 856. In addition, Mr. Brown quoted exerpts from the 1972 Letter of Intent entered into by the Union of India and UCIL, one term of which required that "the purchase of only such design and consultancy services from abroad as are not available within the country" would be allowed. (Brown Aff. at 6). Ranjit K. Dutta states that the Indian Government, in a process of "Indianization," restricted the amount of foreign materials and foreign consultants' time which could be contributed to the project, and mandated the use of Indian materials and experts whenever possible. (Dutta Aff. at 35). In an alleged ongoing attempt to minimize foreign exchange losses through imports, the Union of India insisted on approving equipment to be purchased abroad, through the mechanism of a "capital goods license." (Dutta Aff. at 48–50).

The Indian Government, through its Ministry of Pétroleum and Chemicals, allegedly required information from UCIL regarding all aspects of the Bhopal facility during construction in 1972 and 1973, including "information on toxicity" of chemicals. (Dutta Aff. at 44). The Ministry required progress reports throughout the course of the construction project. These reports were required by the Secretariat for Industrial Approvals, The Director General of Technical Development and the Director of Industries of Madhya Pradesh. (Dutta Aff. at 45). Moreover, UCIL was ultimately required to obtain numerous licenses

during development, construction and operation of the facility. (Dutta Aff. at 46). The list of licenses obtained fills five pages.[21]

The Indian Government regulated the Bhopal plant indirectly under a series of environmental laws, enforced by numerous agencies, much as the Occupational Safety and Health Administration, the Environmental Protection Agency and state and local agencies regulate the chemcial industry in the United States. (Dutta Aff. at 53–56). Emissions from the facility were monitored by a state water pollution board, for example. (Dutta Aff. at 64). In addition, state officials periodically inspected the fully-constructed plant.[22] (Dutta Aff. at 56). A detailed inquiry into the plant's operations was conducted by the Indian Government in the aftermath of the December, 1981 fatality at the MIC unit and the February, 1982 incident involving a pump seal. (Dutta Aff. at 58–62). Numerous federal, state and local commissions, obviously, investigated the most tragic incident of all, the MIC leak of December, 1984.

The recital above demonstrates the immense interest of various Indian governmental agencies in the creation, operation, licensing and regulation, and investigation of the plant. Thus, regardless of the extent of Union Carbide's own involvement in the UCIL plant in Bhopal, or even of its asserted "control" over the plant, the facility was within the sphere of regulation of Indian laws and agenices, at all levels. The comments of the Court of Appeals for the Sixth Circuit with respect to its decision to dismiss a products liability action on *forum non conveniens* grounds seem particularly apposite. In *In re Richardson-Merrell, Inc.*, 545 F.Supp. 1130 (S.D.Ohio 1982), *modified sub. nom. Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984), the court reviewed a dismissal involving an action brought by a number of plain-

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[21] Indian federal and municipal officials also allegedly conducted on-site inspections resulting in approvals for portions of the construction, including approvals for the flare tower, MIC layout and storage, unit refrigeration and MIC/Phosgene structure. (Dutta Aff. at 46–47; Exs. 102–104).

[22] One such regular inspection appears to have taken place approximately two weeks before the MIC disaster. (Dutta Aff. at 56; Ex. 116).

tiffs, all of whom were citizens of Great Britain.[23] Defendant in the action was a drug company which had developed and tested a drug in the United States which was manufactured and marketed in England. The suit was brought against the American parent, not the British subsidiary, for injuries allegedly resulting from ingestion of the offending drug in England and Scotland. The district court, in dismissing the case, stated that:

> This action involves the safety of drugs manufactured in the United Kingdom and sold to its citizens pursuant to licenses issued by that government. The interest of the United Kingdom is overwhelmingly apparent. New York, and Ohio [the United States forums] for that matter, have a minimal interest in the safety of products which are manufactured, regulated and sold abroad by foreign entities, even though development or testing occurred in this country.

In re Richardson-Merrell, Inc., 545 F.Supp. at 1135 (footnote omitted). The Sixth Circuit confirmed this view of the the public interests, stating:

> The interest of the United Kingdom in this litigation is great. The drug was manufactured under a British license by British companies and was marketed and prescribed in the United Kingdom. The alleged injuries took place in England and Scotland and the plaintiffs are citizens and residents of those countries. When a regulated industry, such as pharmaceuticals in this case and passenger aircraft operations in *Piper Aircraft,* is involved, the country where the injury occurs has a particularly strong interest in product liability litigation.... Though no single factor should be determinative in ruling on a *forum non conveniens* motion, the nature of the product and its status as regulated or not must be considered.

Dowling, 727 F.2d at 616.

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[23]Only a small number of plaintiffs in the Bhopal litigation are United States citizens. Of the 200,000 plaintiffs, approximately nine are American. They have filed the complaints numbered 85 Civ. 0447, 85 Civ. 1096 and 85 Civ. 2098. This is of relative insignificance on this motion to dismiss. "The federal courts have not felt constrained to retain jurisdiction over predominantly foreign cases involving American plaintiffs where an examination of the *Gilbert* factors demonstrated that the action is more appropriately brought in a foreign forum.... [T]he presence of a handful of American plaintiffs does not preclude such dismissal." *Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 21 (N.D.Cal.1982), *aff'd sub. nom., Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.1983).

The Indian government, which regulated the Bhopal facility, has an extensive and deep interest in ensuring that its standards for safety are complied with. As regulators, the Indian government and individual citizens even have an interest in knowing whether extant regulations are adequate. This Court, sitting in a foreign country, has considered the extent of regulation by Indian agencies of the Bhopal plant. It finds that this is not the appropriate tribunal to determine whether the Indian regulations were breached, or whether the laws themselves were sufficient to protect Indian citizens from harm. It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country. As another district court stated in the context of a drug product liability action brought by foreign plaintiffs in this country,

> Each government must weigh the merits of permitting the drug's use.... Each makes its own determination as to the standards of degree of safety and duty of care.... This balancing of the over-all benefits to be derived from a product's use with the risk of harm associated with that use is peculiarly suited to a forum of the country in which the product is to be used.... The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country.

Harrison v. Wyeth Laboratories, 510 F.Supp. 1,4 (E.D.Pa.1980), *aff'd mem.,* 676 F.2d 685 (3d Cir.1982). India no doubt evaluated its need for a pesticide plant against the risks inherent in such development. Its conclusions regarding "[q]uestions as to the safety of [products] marketed" or manufactured in India were "properly the concern of that country." *Harrison* at 4 (emphasis omitted). This is particularly true where, as here, the interests of the regulators were possibly drastically different from concerns of American regulators. The Court is well aware of the moral danger of creating the "double-standard" feared by plaintiffs and *amicus curiae*. However, when an industry is as regulated as the chemical industry is in India, the failure to acknowledge inherent differences in the aims and concerns of Indian, as compared to American citizens would be naive, and unfair to defendant. The district court in *Harrison* considered the hypothetical instance in which a products liability action arising out of an Indian accident would be brought in the United States. The court speculated as follows:

> The impropriety of [applying American standards of product safety and care] would be even more clearly seen if the foreign country involved was, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. Most signigicantly, our two societies must deal with entirely different and highly complex problems of population growth and control. Faced with different needs, problems and resources in our example India may, in balancing the pros and cons...give different weight to various factors than would our society.... Should we impose our standards upon them in spite of such differences? We think not.

Harrison at 4–5. This Court, too, thinks that it should avoid imposing characteristically American values on Indian concerns.

The Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is signigicantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology. The supposed "blackmail" effect of dismissal by which plaintiffs are troubled is not a significant interest of the American population, either. Surely, there will be no relaxing of regulatory standards by the responsible legislators of the United States as a response to lower standards abroad.[24] Other concerns than bald fear of potential liability, such as convenience or tax benefits, bear on decisions regarding where to locate a plant. Moreover, the purported public interest of seizing this chance to create new law is no real interest at all. This Court would exceed its authority were it to rule otherwise when restraint was in order.

The Court concludes that the public interest of India in this litigation far outweighs the public interest of the United States. This litigation offers a developing nation the opportunity to vindicate the suffering of

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[24] In any event, plaintiffs' "deterrence" and "blackmail" arguments presuppose that Union Carbide would be held more accountable by an American than by an Indian tribunal. Certainly, there is a real possibility of a substantial Indian judgment against defendant, which would serve an identical deterrent function, and prevent a rush of multinationals to foreign locations.

its own people within the framework of a legitimate legal system. This interest is of paramount importance.[25]

C. The Applicable Law.

Gilbert and *Piper* explicitly acknowledge that the need of an American court to apply foreign law is an appropriate concern on a *forum non conveniens* motion, and can in fact point toward dismissal. *Gilbert*, 330 U.S. at 509, 67 S.Ct. at 843; *Piper*, 454 U.S. at 260, 102 S.Ct. at 268. Especially when, as here, all other factors favor dismissal, the need to apply foreign law is a significant consideration on this type of motion. *Piper* at 260, n. 29, 102 S.Ct. at 268, n. 29. A federal court is bound to apply the choice of law rules of the state in which an action was originally brought; even upon transfer to a different district, "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 821, 11 L.Ed.2d 945 (1964). Thus, this Court, sitting over a multidistrict litigation, must apply the various choice of law rules of the states in which the actions now consolidated before it were brought.[26] Rather than undertake the task of evaluating the choice of law rules of each state separately, the Court will treat the choice of law doctrine *in toto*. The "governmental interest" analysis, employed by many jurisdictions, requires a court to look to the question of which state has the most compelling interest in the outcome of the case. India's interest in the outcome of the litigation exceeds America's, *see supra* at 44–58. The *lex loci delicti* analysis used in other jurisdictions indicates that the law of the state where the tort occurred should be applied. The place in which the tort occurred was, to a very great extent, India. Other states apply the "most significant relationship" test, or "weight of contacts" test, which evaluate in which

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[25] While the accident is more than a "local controversy," given the interests of the Indian populace, it is certainly a national controversy which should be "decided at home." *Gilbert* at 508–09. No doubt Indian citizens, many of whom barely are acquainted with their American lawyers, will find the case more accessible if it is tried "in their view" in India.

[26] Upon a cursory review of the individual complaints comprising this action, the Court notes that suits were brought in California, Connecticut, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New Jersey, New York, Pennsylvania, Tennessee, Texas and West Virginia, at a minimum.

state most of the events constituting the tort occurred. The contacts with India with respect to all phases of plant construction, operation, malfunction and subsequent injuries are greater in number than those with the United States. Thus, under any one of these three doctrines, it is likely that Indian law will emerge as the operative law. An Indian court, therefore, would be better able to apply the controlling law than would this United States Court, or a jury working with it. This public interest factor also weighs in favor of dismissal on the grounds of *forum non conveniens*.

CONCLUSION

It is difficult to imagine how a greater tragedy could occur to a peacetime population than the deadly gas leak in Bhopal on the night of December 2–3, 1984. The survivors of the dead victims, the injured and others who suffered, or may in the future suffer due to the disaster, are entitled to compensation. This Court is firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability. Futher, the Indian courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims.

The presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India. All of the private interest factors described in *Piper* and *Gilbert* weigh heavily toward dismissal of this case on the grounds of *forum non conveniens*.

The public interest factors set forth in *Piper* and *Gilbert* also favor dismissal. The administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case.

The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which

affected its citizens on its own soil. Perhaps Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interest of the citizens of the United States in the litigation.

Plaintiffs, including the Union of India, have argued that the courts of India are not up to the task of conducting the Bhopal litigation. They assert that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people.

The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, it standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.

This Court defers to the adequacy and ability of the courts of India. Their interest in the sad events of December 2–3, 1984 at the UCIL plant in the City of Bhopal, State of Madhya Pradesh, Union of India, is not subject to question or challenge. The availability of the probative, relevant, material and necessary evidence to Indian courts is obvious and has been demonstrated in this opinion.

Therefore, the consolidated case is dismissed on the grounds of *forum non conveniens* under the following conditions:

1. Union Carbide shall consent to submit to jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations;
2. Union Carbide shall agree to satisfy any judgment rendered against it by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affir-

mance comport with the minimal requirements of due process;

3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

SO ORDERED.

APPENDIX C

Docket No. 86-7517

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 26th day of February one thousand nine hundred and eighty-seven

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IN RE UNION CARBIDE CORP. BHOPAL DISASTER

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the INDIVIDUAL PLAINTIFFS

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX D

ART. 53, RECOGNITION OF FOREIGN COUNTRY MONEY JUDGMENTS, 7B N.Y. Civ. Prac. L.&R. §§ 5301-09 (McKinney 1978)

§ 5301. Definitions

As used in this article the following definitions shall be applicable.

(a) Foreign state. "Foreign state" in this article means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands.

(b) Foreign country judgment. "Foreign country judgment" in this article means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

§ 5302. Applicability

This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

§ 5303. Recognition and enforcement

Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.

§5304. Grounds for non-recognition

(a) No recognition. A foreign country judgment is not conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agrement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

§ 5305. Personal jurisdiction

(a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;

2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

6. the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(b) Other bases of jurisdiction. The courts of this state may recognize other bases of jurisdiction.

§ 5306. Stay in case of appeal

If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign country judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

§ 5307. Recognition in other situations

This article does not prevent the recognition of a foreign country judgment in situations not covered by this article.

§ 5308. Uniformity of interpretation

This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact these provisions.

§ 5309. Citation

This article may be cited as the "Uniform Foreign Country Money-Judgments Recognition Act."